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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 286.

CITY OF CHICAGO, *Appellant*,

vs.

DARIUS O. MILLS.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF ON BEHALF OF APPELLEE.

WILLIAM D. GUTHRIE,
JOHN J. HERRICK,
I. K. BOYESEN,
Of counsel.

Washington, December 10, 1906.

[20,245.]

[20,245]

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF ON BEHALF OF APPELLEE.

This is an appeal from a decree of the circuit court of the United States for the Northern District of Illinois, Eastern Division, filed February 27, 1906, which granted a perpetual writ of injunction restraining the city of Chicago from enforcing an ordinance adopted by the city council October 15, 1900, which regulated the price of gas, and also enjoining the People's Gas Light and Coke Company from complying with the said ordinance (record, p. 387). The suit was brought by the complainant Mills as a stockholder of the People's Gas Light and Coke Company and a citizen of the State of California against said company and the city of Chicago, both corporations organized and existing under and by virtue of the laws of the State of Illinois (p. 2), and demand and compliance with the ninety-fourth equity rule and refusal of the company to sue were duly averred (pp. 17, 82–83). The bill as originally filed invoked the jurisdiction of the court below as a federal

court on two grounds : (first) that there existed a diversity of citizenship in that the complainant was a citizen of California and the defendants were citizens of Illinois (p. 2), and (secondly) that the ordinance impaired the obligation of a contract embodied in the charter of the People's Gas Light and Coke Company in contravention of section 10 of article 1 of the Constitution of the United States (pp. 14, 17). The original bill averred not only that the obligation of the charter contract of the People's Company had been impaired, but that the ordinance was illegal and void in that no power to pass it had been delegated to the city council by the legislature of Illinois (p. 14), and the relief prayed for was that the ordinance be adjudged illegal and void because in contravention of section 10 of article 1 of the Constitution of the United States, and, further, because enacted without valid legal authority from the State of Illinois (p. 17).

The ordinance in question was adopted by the city council of Chicago October 15, 1900, and it provided among other things (p. 13) that no corporation, company or companies, firm or persons manufacturing, selling, supplying or distributing gas in the city of Chicago for illuminating or fuel purposes should charge, demand or collect from any consumer more than the sum of seventy-five cents per one thousand cubic feet of gas consumed or used. The ordinance further provided that any such corporation, company, person or persons charging the city of Chicago or any citizen thereof or any consumer of gas a sum in excess of said prescribed rate should be subject to a penalty of not less than

twenty-five dollars nor more than two hundred dollars for each and every offence (pp. 13–14).

The jurisdiction of this court to hear and determine the present appeal is claimed by appellant, defendant below, under and by virtue of the first subdivision of the fifth section of the judiciary act of March 3, 1891, which provides that a direct appeal may be taken from a circuit court to this court "in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." The court below certified that the appeal was prayed by the appellant city of Chicago and allowed "solely upon the question of the jurisdiction of this court as a circuit court of the United States to hear and determine this cause," but without stating the specific or definite question of jurisdiction intended to be certified, whether as to diversity of citizenship, or amount in controversy, or collusion, or otherwise (record, p. 394).

During the pendency of the present litigation and since the decision of this court in a prior suit, 194 U. S. 1, the legislature of Illinois has conferred the necessary power on the city council by an act approved May 18, 1905, and the city council has adopted a new ordinance (under date of February 8, 1906) fixing the price of gas at eighty-five cents per thousand cubic feet and repealing the ordinance of October 15, 1900, although reserving all rights that may have accrued thereunder. Copies of the act of 1905 and of the repealing ordinance of February 8, 1906, are printed in the appendix to this brief.

In order to appreciate the occasion and necessity f the present suit, it is necessary to know the history o the present and the prior litigation. Shortly after t passage by the city council of Chicago of the ordinan of October 15, 1900, in question, the People's G Light and Coke Company instituted a suit in the circuit court of the United States for the Northern District of Illinois, and in its original bill of complaint alleged that the ordinance impaired the obligation of a contract embodied in its charter, denied the company the equal protection of the laws and amounted to a confiscation of its property, in violation of the Constitution of the United States (pp. 289–290), and further alleged that no power had been conferred by the legislature upon the city of Chicago to regulate the price of gas (p. 290). The contract right relied on by the People's Company was an amendment to its charter in and by an act of the legislature of Illinois of February 7, 1865, which contained a clause that the "common council of the city of Chicago shall, in no case, be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet" (pp. 4, 282), which rate had been reduced to one dollar per thousand cubic feet (pp. 9, 284). It was alleged in the bill that the People's Company had laid an extensive system throughout the streets of the city of Chicago, and was then engaged in the business of manufacturing, selling and distributing gas at the rate of one dollar per thousand cubic feet, that its charter contract or immunity was "in full force and effect and has not been repealed, annulled or canceled" (p. 283);

that the ordinance was invalid, and that its enforcement would involve the company in irreparable damage and innumerable suits (pp. 287, 289, 290). To this bill of complaint, the defendant city of Chicago filed a general demurrer (p. 294). On the hearing, however, additional facts were developed "in answer to inquiries of the court, though not set forth in the bill" (p. 300), whereby it appeared that the People's Company had originally manufactured and distributed gas upon the west side of the city of Chicago only, "and that its south side and north side system was acquired through merger or purchase of other gas companies under the consolidation act of 1897" (*ibid*). The question thereupon presented was whether the contract exemption or immunity vested in the People's Company in and by its amended charter extended to the properties and systems acquired from other companies, and it was held by the circuit court that "the complainant, to the extent, at least, that it is successor to the merged companies, enjoys no exemption from regulation" (p. 301), and that it was not necessary to determine "whether, by the merger, the complainant has lost its right to exemption from regulation, to the extent that the consent was given to the installation of its original system . . . for the bill asks for no divisional relief" (p. 302). The circuit court also stated in its opinion that as it found that there was no contract right impaired and hence no federal question involved, its jurisdiction did not extend to the question of the power of the city council to pass the ordinance, but that such question was one primarily belonging to the state courts

(p. 301). Thereupon, the People's Company filed an amended bill (pp. 303 *et seq.*), from which it omitted any allegation or prayer for relief as to the power of the city council or as to the alleged confiscation or equal protection of the laws, and confined its allegations and its prayer for relief to the alleged impairment of its contract right, an essentially federal question clearly conferring jurisdiction. The defendant city of Chicago demurred likewise to this amended bill (p. 362) and a rehearing was had (p. 363). On such rehearing, the court adhered to its former decision, and filed an opinion which concluded as follows (p. 364):

> "The demurrer to the amended bill will be sustained and *the bill dismissed for want of jurisdiction in this court over the cause of action set forth.*"

A final order or decree was thereupon entered in the following words (p. 365):

> "It is hereby ordered, adjudged and decreed, that said demurrer be and the same is hereby sustained; *that said amended bill be and the same is hereby dismissed for want of jurisdiction* at the cost of complainant, and that defendant have execution for said costs."

An appeal was duly allowed and taken to this court and the case docketed in the office of the clerk of this court September 25, 1902 (p. 369), but the company failed and neglected to file any bill in the state court raising the question of power of the city council, and was apparently relying wholly on its appeal to this court notwithstanding that its amended bill, as stated above, did not raise any question as to power.

At this stage, Mr. Darius O. Mills, who had for nearly ten years been largely interested in the bonds

and stocks of the People's Company, evidently became anxious about the situation and consulted counsel in regard to the pending litigation, namely, Mr. William D. Guthrie of the New York bar (p. 159). In so acting, Mr. Mills "had nothing to do with the company," but went to Mr. Guthrie on his own account (p. 165). Mr. Mills was in fact the largest stockholder of the company (pp. 187, 222). His average holdings from 1893 to 1905 were shown to have varied from 1,233 shares or $123,300 par value in 1893 to as much as 26,750 shares or $2,675,000 par value in 1897, and his holdings in 1902 when he consulted counsel were 22,755 shares or a par value of $2,275,500 (p. 158). The date when Mr. Mills consulted counsel was not definitely fixed and there was some confusion in his recollection in regard to the date (see, however, p. 196), but, as the final decree dismissing the bill of the People's Company was entered on July 30, 1902 (p. 365), there can be no reasonable doubt that it must have been between that date and December 16, 1902. The testimony on this point was as follows (pp. 159–160):

> "Q. [By Mr. Guthrie]. What, if anything, did you do after hearing the result of the People's suit in regard to your interest in the People's Company? A. I remember calling on you for information. I was very much interested in the stock of the company—in my investment there, in the safety of it, and I remember calling on you to inquire or to get your opinion as to what might be the result of the litigation.
>
> Q. Do you remember at that time asking anybody, and, if so, whom, to protect your interest in the matter? . . . A. Subsequently, yes, sir.

Q. And whom did you request to advise you in connection with the matter ? . . . A. Mr. Guthrie.

Q. That is, Mr. William D. Guthrie, of the firm of Guthrie, Cravath & Henderson ? A. Yes, sir.

Q. Mr. Mills, do you remember, on or about December 16th, 1902, addressing a letter to the Board of Directors of the People's Gas Light and Coke Company ? A. I remember of addressing a letter to them, but I would not remember the date.

Q. Who prepared such letter ? A. It was prepared under your advice."

The letter was read in evidence, and is as follows (p. 160):

" NEW YORK, December 16, 1902.

To the Board of Directors of the People's Gas Light and Coke Company:

Dear Sirs: I believe you are aware that I am, and for upwards of five years last past have been, the largest stockholder of the People's Gas Light and Coke Company, and, of course, as such stockholder, I am vitally interested in the questions which have arisen under the ordinance of the common council of the city of Chicago reducing the price to be charged for illuminating and fuel gas to 75 cents per thousand cubic feet.

I have caused to be submitted to my counsel the proceedings in the suit instituted in the circuit court of the United States at Chicago for the purpose of restraining the enforcement of this ordinance on the ground that it constituted an impairment of the obligation of the contract contained in our charter, together with a copy of the opinions of Judge Grosscup, and have informed such counsel that the case has been appealed to the Supreme Court of the United States, and will probably not be reached for argument until some time during the year 1904.

I am advised by counsel that the interests of the

People's Gas Light and Coke Company may not be adequately protected by the pending litigation for the following reasons:

First. That the bill in the pending suit was dismissed for want of jurisdiction in the circuit court of the United States for the Northern District of Illinois, and that in view of such disposition the Supreme Court of the United States may limit the point which it will consider on the present appeal to the naked question of jurisdiction.

Secondly. That the present suit does not involve any question as to the power of the common council of the city of Chicago to reduce the charges of our company.

In view of the vital interest to all stockholders of these questions, I hereby request that you will cause to be instituted at the earliest practicable moment a new suit against the city of Chicago or otherwise, for the purpose of preventing the enforcement of this ordinance upon the ground that it impairs our charter contract, and that the common council had no power to pass it. The facts stated in the amended bill of complaint in the pending suit I am advised fully show the necessity for a resort to equity for the protection of our rights.

It seems to me that the importance of this matter to the company and its stockholders cannot be exaggerated. If the ordinance is valid, the revenue of the company will be decreased one-quarter of the present gross income and very much more than this of the net income.

Yours truly,

D. O. MILLS."

This letter of December 16, 1902, so addressed to the People's Company by Mr. Mills was submitted to the company's counsel, Mr. James F. Meagher of Chicago, for his advice, and it appears that he came to New York and had

two or three conferences with Mr. Mills' counsel, Mr. Guthrie, in regard to the request that a new suit should be brought (p. 255). The testimony shows that there was a radical difference of opinion between counsel (pp. 255, 263). Mr. Guthrie, on the one hand, urged that this court on the then pending appeal in the case of the People's Company "might not decide anything but the question of jurisdiction and would not decide the question of power or the charter contract" (p. 255), that delay in securing an adjudication upon the questions involved would not be to the advantage of the company, and that he thought suit should be brought at once (p. 256). On the other hand, Mr. Meagher was of opinion that additional litigation by the People's Company at that time might be prejudicial to its interests, that a clear error had been committed in dismissing the bill for want of jurisdiction, and that it would be a tactical advantage to reverse the prior judgment (pp. 255–256), and he notified Mr. Guthrie that he would advise the board to decline Mr. Mills' request (p. 256).

Mr. Mills' letter of December 16, 1902, was submitted to the board of directors of the People's Company at a meeting held January 29, 1903, and the board under advice of counsel declined to institute a new suit (pp. 204, 228, 256, 277–279). The advice so given was by Mr. Meagher and concurred in by his associates Judge Moran and Judge Sears (p. 257). The grounds upon which this advice was based were fully set forth in the testimony as follows (pp. 255-257):

> "Q. And what, according to your best recollection, was the substance of the conversation between you

and Mr. Guthrie on the subject of having a new suit brought by the company in view of the dismissal of the other suit? . . . A. I was opposed to the company bringing the suit, and I think, as I remember it, you [*i. e.* Mr. Guthrie] were very firm in the position that another suit should be instituted and we disagreed about it.

Q. Do you remember what Mr. Guthrie stated as the reason why, in his opinion, a new suit should be brought? . . . A. Well, I thought that the questions which would be raised in a new suit were already raised in the pending suit. Judge Moran agreed thoroughly with me on that proposition. Judge Sears also agreed with me on the proposition. I think, Mr. Guthrie, your position was that the Supreme Court might not decide anything but the question of jurisdiction and would not decide the question of power or the charter contract. I think I wanted the advantage of reversing Judge Grosscup; that I felt confident that we could reverse him and that I felt if he were reversed it would be to the great advantage of the People's Company and that it would be to the benefit of the company in its dealings with the city, and with the people of the City of Chicago. That, I think, as I remember, were the differences between us. I believe you made the point that delay might not be to our advantage and that you thought this suit should be brought at once; and I said, 'I don't think it should be because it might be the equivalent of abandoning our appeal, and in any event if we brought another suit the point would be made in the Supreme Court of the United States that we had no confidence in our appeal as was evidenced by the fact that since perfecting it we had commenced another suit in another court.' I think there were times when the argument became a little heated.

Q. Did you communicate to Mr. Guthrie at that

time the views of your associates, Judge Moran and Judge Sears? A. I think I did. I know we went over it very thoroughly.

Q. And did you advise Mr. Guthrie of the substance of the opinion that you intended to express to the Board of Directors upon the subject? A. I think at the last time I talked with you. I think the last time I said to you that I should advise the Board not to comply with the request.

Q. Do you remember a meeting of the Board of Directors of the People's Gas Light and Coke Company, held in the City of New York on January 29th, 1903? A. I do.

Q. Who was present at that meeting? A. The full Board of Directors and myself. I will give you the names if you wish: Mr. Billings, Mr. Brady, Mr. Knapp, Mr. Ferguson and Mr. Flower and myself.

Q. Will you please state what occurred at that meeting according to your best recollection? A. As I remember the circumstances, the request of Mr. Mills was read to the Board. I stated that it had been forwarded to me by either Mr. Billings or Mr. Knapp; that I had examined the question with great care, not merely alone, but in conjunction with Judge Moran and Judge Sears; that I had gone to Judge Moran s office at least twice in relation to it and he had been to our office once. Judge Sears, my partner and I had been over it a number of times. I think I stated to the Board that I had been in conference or at least in negotiation with Mr. Guthrie about it and that after a thorough examination of the question I felt constrained to advise the Board not to comply with the request, because, in my opinion, we would be sure to reverse Judge Grosscup.

That would be a great tactical advantage at least. That I thought, furthermore, it would be unwise from the standpoint of policy to institute another suit, because the public would at once say that we

were simply trying to hamper and complicate the situation by numerous suits. I said also that if we were to bring the suit I felt the fact would certainly get to the Supreme Court of the United States on the hearing of our appeal, and I thought it would at least in some degree prejudice us or might affect us in that Court, and I therefore advised against the institution of the suit and urged as strongly as I knew how that Mr. Mills' request be not complied with.

I stated to the Board that the opinion was not alone my opinion, but was the opinion of Judge Moran and of Judge Sears.

We have no doubt that it would be a mistake to comply with Mr. Mills' request, and I advised against it. At that time we had the *quo warranto* suit pending, as I remember. There was also pending what were known as the Hale cases. . . .

The Hale suits briefly were instituted for the purpose of compelling the People's Gas Light and Coke Company to sell gas for less than one dollar a thousand in the city of Chicago. . . .

I called attention to that fact, that an injunction had been granted, issued out of the circuit court of the United States, which protected the company pending the appeal, and from every consideration that I was able to give the matter, I thought it would be unwise to commence another suit as requested by Mr. Mills."

Acting upon this advice, the request was declined (pp. 204, 228, 274–278, 277–279) and the company sent an answer to Mr. Mills as follows (p. 161) :

"NEW YORK, January 29, 1903.

D. O. MILLS, Esq., 35 Wall Street, New York.

Dear Sir : I beg to acknowledge receipt of your letter of December 16, 1902, which was submitted to the Board of Directors of the Company, and after conference with the counsel to the Company, the Board

felt constrained under all the circumstances to decline to institute any further litigation at the present time, and their action was evidenced by the following resolution, which I am directed to communicate to you, viz.:

'*Resolved*, that this company declines to accede to the request of Mr. D. O. Mills, contained in his communication to the Board of Directors of this company, dated the 16th day of December, 1902, for the reason that this board believes that for this company to institute further legal proceedings to contest the legality of the ordinance adopted by the common council of the city of Chicago, October 15th, 1900, would excite public prejudice against this company, which at the present time it is deemed of great importance to avoid.

Be it Further Resolved, the secretary be instructed to notify Mr. Mills of the action of this board, at this meeting, and send to him a copy of this resolution.'

Yours very truly,

H. W. OLCOTT.

Assistant Secretary."

The delay in answering was shown to have been due to the fact that three of the five directors of the People's Company, Mr. Knapp, Mr. Billings and Mr. Brady were absent in Europe on business and that no meeting of the board could be had in their absence because of the want of a quorum (pp. 203, 227, 255, 256).

Upon the refusal of the directors of the People's Company to file a new bill, the question was submitted to the stockholders at the annual meeting held February 10, 1903, in a proposed resolution directing the institution of the suit, but the resolution was defeated (pp. 145–146, 273–276). Thereafter and on June 8, 1903, Mr. Mills filed the original bill in the present suit (p. 1).

It appeared from the testimony that the suit was brought by Mr. Mills without any agreement or understanding whatever with the company, and solely for the protection of his individual interests as the largest stockholder in the company (pp. 164, 187, 222), an interest amounting at that time to over $2,200,000 (p. 158); that after he acquired knowledge from the public prints of the result of the litigation between the city and the People's Company, he asked the advice of independent counsel of his own volition (pp. 159, 174); that upon the refusal of the company to take the action which he demanded, he personally verified the original and amended bills of complaint, executed a bond and indemnified the surety company which gave the injunction bond (pp. 162, 163); that the suit was conducted at his own expense (p. 163) except so far as other stockholders similarly situated might choose to contribute (p. 181); that the suit was not brought at the request of the People's Company (p. 164); that he had no agreement with the People's Company in regard to the institution of the suit or in regard to the expense that might be incurred in prosecuting it (pp. 164, 180, 181, 222); that he had no agreement of any kind, directly or indirectly, with the People's Company or anyone else to indemnify him personally against the expenses and costs of the suit (pp. 164, 222, 229, 240, 261); and, as he phrased it on his cross-examination: "I had nothing to do with the company. I went [*i. e.*, to counsel] on my own account" (p. 165).

The defendant city of Chicago on July 6, 1903, filed a demurrer to the original bill of Mr. Mills, and such demurrer came on to be heard by the court below on December 5, 1903 (pp. 1, 47, 48). On this hearing, the complainant urged as alleged in his bill (p. 17) that the decree in the prior suit did not constitute *res adjudicata* because the dismissal had been for want of jurisdiction and that therefore a new suit would lie even on the question of the alleged contract right, whereupon the court said: "'Well, that is a mistake,' referring to the decree; 'I did not intend to enter that decree, that is wrong, that decree ought to be amended so as to correctly express what the court intended to do,' and after some discussion the record was amended . . . to show that the court dismissed the bill on the merits as to the contract set up in the bill, being the charter of the People's Company, but without prejudice to the right to bring any other suit," etc. (pp. 259–260). Thereupon the People's Company and the city of Chicago entered into the following stipulation, a copy of which was filed in this court as part of the record in the case of *People's Gas Light & Coke Company* v. *Chicago*, 194 U. S. 1, as will appear by the files in the office of the clerk of this court to which reference is prayed:

"United States Circuit Court for the Northern District of Illinois, Northern Division.

THE PEOPLES GAS LIGHT AND COKE COMPANY	No. 25780
vs.	
CITY OF CHICAGO.	

It is hereby stipulated and agreed by and between

the parties in the above-entitled suit that the decree heretofore entered in the above-entitled suit on or about the thirtieth day of July, 1902, in the absence of the Honorable Peter S. Grosscup, circuit judge, before whom the case was heard and argued, and which decree does not correctly recite the judgment as intended by the court, be amended *nunc pro tunc* as of said July 30th, 1902, so as to strike therefrom, after the word 'dismissed,' the words 'for want of jurisdiction,' and to insert in lieu thereof the words 'upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois;' that an order or decree so amending and correcting said decree be forthwith entered without prejudice to any of the proceedings heretofore had or to the appeal from said decree of July 30th, 1902, now pending in the Supreme Court of the United States, and that such proceedings be had in said Supreme Court as shall effectuate the amendment of said decree *nunc pro tunc* as fully to all intents and purposes as if contained in the original record now in said Supreme Court, so that the appeal may be heard and decided on the decree as now amended *nunc pro tunc*.

It is also hereby stipulated and agreed that the opinion of the court on rehearing be likewise amended *nunc pro tunc*, so as to omit therefrom, after the word 'dismissed' the words 'for want of jurisdiction in this court over the cause of action set forth," and to insert in lieu thereof the words, 'upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois," and

that an order be entered amending the record accordingly.

Chicago, December 5, 1903.

SEARS, MEAGHER & WHITNEY,
Solicitors for Peoples' Gas Light & Coke Company.
GRANVILLE W. BROWNING,
Solicitor for the Defendant, The City of Chicago.

(Endorsed :) Filed Dec. 5, 1903. Marshall E. Sampsell, clerk."

The order then entered reads as follows (p. 370):

"On reading and filing the annexed consent and stipulation to the entry of this order which is hereby made a part hereof, It is Ordered and Decreed that the final order and decree heretofore entered July 30, 1902, in the above-entitled suit now pending on appeal to the Supreme Court of the United States, be and the same hereby is amended *nunc pro tunc* as of said July 30, 1902, so as to state the true decision of the court by striking therefrom after the word 'dismissed' the words, 'for want of jurisdiction,' and inserting in lieu thereof the words 'upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois' and that the record on appeal be and the same hereby is amended accordingly, so that said appeal may be heard and decided on the decree as now amended *nunc pro tunc*."

In view of this amendment of the decree *by consent of the People's Company and the city of Chicago*, a motion was made in this court in the pending appeal and its attention called to the proceedings correcting the decree, and the decree as amended was duly brought before it and made part of the record.

On such appeal when heard in January, 1904 (*People's*

Gas Light & Coke Co. v. *Chicago*, 194 U. S. 1), this court reviewed the details and merits of the alleged charter contract, and it was held, affirming the court below, that the asserted contract immunity, even if conceded, did not extend to so much of the system of the People's Gas Light and Coke Company as passed to it as a consolidated company from companies not possessing such immunity in their own right (194 U. S. at p. 17); but this court did not rule upon the question of the power of the city council to pass any such ordinance in view of the fact that the decree as it stood at the time the case was considered by this court had been amended *by consent*. The court will recall the importance attached on the argument to this amendment *by consent* and to the reservation therein of the right to institute any other suit in respect to the question of power. Commenting on this phase, Mr. Chief Justice Fuller, speaking for the court, said (194 U. S. at p. 8):

> "Subsequently it was stipulated and agreed by and between the parties that the decree as entered did not correctly recite what was intended by the court, and that it should be amended by striking out the words 'for want of jurisdiction,' and inserting in lieu thereof the words 'upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois.' An order was then entered by the court, amending its previous decree *nunc pro tunc* in the particulars named."

And at p. 14, in answer to the contention on behalf of the People's Company that the existence of the federal question as to the alleged impairment of a contract war-

ranted the court in proceeding to decide any other questions involved, such as that of the power of the city council, the court said :

> "The decree, as it stands, *amended by consent*, in terms reserved the question to be raised in some other appropriate suit in a proper court. In these circumstances we are constrained to decline the consideration of that question so far as it relates to the contention that power to regulate was conferred by the general law of Illinois of 1871-2, providing for the incorporation of cities and villages under which the city of Chicago as now constituted was incorporated."

The court will also recall that the fact of the pendency of the present suit was stated on the argument and that a copy of Circuit Judge Grosscup's opinion in this suit overruling the demurrer of the city of Chicago (record, p. 49 ; 127 Fed. Rep. 731) was subsequently filed and submitted to this court.

Thereafter, in view of the decision of this court (194 U. S. 1) affirming the decree in the suit of the People's Company, an amended bill was filed in the present suit eliminating the federal question as to the impairment of the alleged contract right and confining the case to the question of the power of the city council of Chicago under the laws of Illinois (pp. 75–84). On February 11, 1905, the city of Chicago filed a demurrer to this amended bill (pp. 91-92), which demurrer was overruled on August 1, 1905 (p. 93), and thereupon the city filed an answer (pp. 94 *et seq.*), which put in issue the allegations as to diversity of citizenship, as to the value of the matter in dispute represented by the complainant's interest in the company, as to the absence of collusion and as to the

absence of a remedy at law (pp. 94, 97, 99, 100, 102). A replication having been filed (p. 106), a special examiner was appointed to take testimony under rule 67 (pp. 113–114), before whom the witnesses appeared and testified (pp. 140 *et seq.*). Upon the completion of the taking of the oral testimony, the case was brought on for final hearing. On such final hearing, the learned Circuit Judge filed an opinion in which the testimony was reviewed, the facts found in favor of the complainant, and a decree directed to be entered enjoining the enforcement of the ordinance on the ground that in October, 1900, the city council of Chicago had no power to pass the same (pp. 385–386), and adjudging that the suit was of a civil nature in which the matter in dispute, exclusive of interest and costs, exceeded the sum or value of two thousand dollars, that there was a controversy between citizens of different states, that the requirements of equity rule 94 had been duly complied with, and that the suit was not a collusive one (p. 387). From this final decree, the defendant city presented a petition of appeal stating that "the circuit court erred in taking jurisdiction of the bill and in not dismissing the bill in this cause for want of jurisdiction" (p. 389). The appeal was thereupon allowed "solely upon the question of the jurisdiction of this court sitting as a circuit court of the United States, to hear and determine this cause, between the parties to the bill as presented therein" (p. 392). Thereafter, the court made a certificate to the effect that at the final hearing the defendant city had objected to the jurisdiction of the court "as a circuit court of the United States to hear

and determine this cause" and had prayed an appeal "solely upon the question of the jurisdiction of this court as a circuit court of the United States to hear and determine this cause" (p. 394). Other than these statements, nothing was shown in the decree, petition for appeal, order allowing appeal or certificate to indicate what specific or definite question of jurisdiction was certified or intended to be certified, and this court is now asked to determine from the twelve assignments of error (p. 390) and from the whole record, pleadings, testimony and exhibits as the evidence heard, received or considered by the court below "at any time on the question of jurisdiction" (pp. 394–396) what precise or definite question of jurisdiction was intended to be certified for its review.

The brief now filed in this court on behalf of the city of Chicago not only discusses the jurisdiction of the court below as a court of the United States, but likewise its jurisdiction as a court of equity to entertain any bill filed by a stockholder upon the refusal of the managers and stockholders of the company to sue. Thus, it is insisted that the company rightfully refused to comply with Mr. Mills' request for a new suit and that he as a stockholder should have abided by the judgment of the directors (p. 60). The suggestion also is urged that no situation involving threatened irreparable damage, etc., was shown which would justify the interposition of a court of equity at the suit of a stockholder (pp. 61, 65). It may, therefore, be appropriate to mention here that the allegations of the original and amended bills (pp. 14–16,

80–82) and the facts proved (pp. 200–202, 224) clearly established the jurisdiction in equity to avoid a multiplicity of suits, to conserve the public interests, and to avoid irreparable injury to the company and its stockholders. *Donovan* v. *Pennsylvania Company*, 199 U. S. 279, 305. It may also be appropriate to state that the decision of the court below on the merits, following its prior decision (p. 49 ; 127 Fed. Rep. 731) to the effect that the city of Chicago was without power to pass the ordinance of October 15, 1900, because no such power had then been delegated to it by the legislature, was based upon a long and unbroken line of decisions, *e. g.* : *Laugel* v. *City of Bushnell*, 197 Illinois, 20, 27 ; *Coquard* v. *Village of Oquawka*, 192 Illinois, 355, 365 ; *Wice* v. *C. & N. W. Ry. Co.*, 193 Illinois, 351, 353 ; *Wilkie* v. *Chicago*, 188 Illinois, 444, 450 ; *Kiel* v. *City of Chicago*, 176 Illinois, 137, 141 ; *City of Chicago* v. *Blair*, 149 Illinois, 310, 318 ; *Smith* v. *McDowell*, 148 Illinois, 51, 62 ; *Seeger* v. *Mueller*, 133 Illinois, 86, 94 ; *City of Cairo* v. *Bross*, 101 Illinois, 475, 478 ; *St. Louis* v. *Western Union Telegraph Co.*, 149 U. S. 465, 471 ; *Barnett* v. *Dennison*, 145 U. S. 135, 139 ; *Atkin* v. *Kansas*, 191 U. S. 207, 220 ; *Citizens St. Ry.* v. *Detroit Railway*, 171 U. S. 48, 54 ; *City of St. Louis* v. *Bell Telephone Co.*, 96 Mo. 623, 629 ; *State ex rel Garner* v. *Missouri Telephone Co.*, 189 Mo. 83, 103 ; *State* v. *Sheboygan*, 111 Wisc. 23, 38, 39 ; *In re Pryor*, 55 Kansas, 724, 728, 729 ; *Lewisville Natural Gas Co.* v. *State*, 135 Indiana, 49, 52 ; *Schroeder* v. *Gas & Water Co.*, 20 Pa. Super. Ct. 255, 259.

I.

As to the act of 1875 and questions arising thereunder and under the ninety-fourth rule in equity.

It will be assumed that all questions of equity jurisdiction, such as whether or not the board of directors ought to have complied with the request to sue or whether circumstances existed justifying a resort to equity will not be considered on this appeal. They involve simply inquiries as to general equity jurisdiction applicable alike to state and federal courts, and are not within the scope of the power of this court to review on this appeal. *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424, 432; *Courtney* v. *Pradt*, 196 U. S. 89, 91; *Bache* v. *Hunt*, 193 U. S. 523, 525; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 232; *Smith* v. *McKay*, 161 U. S. 355, 357. The only question which this court will consider is as to the jurisdiction of the court below as a court of the United States and not any question as to its jurisdiction as a court of equity. In the final analysis, therefore, even if any question of jurisdiction be found to have been duly and definitely certified to this court, the inquiry is not whether the board of directors and the stockholders wisely or wrongfully refused to institute a suit in January, 1903, or whether under general principles of equity jurisdiction the complainant as a stockholder was entitled to sue on behalf of himself and all other stockholders to protect the company's interests, but whether the refusal to sue, as to which no dispute exists, was sham and colorable and merely in pursuance of a collusive agreement between the complainant and the company for the

purpose of conferring jurisdiction on the court below in a case of which it would not otherwise have cognizance.

Stated in somewhat different language, the question whether, in the absence of collusion, the record shows that the complainant failed to establish his right as a stockholder in the People's Company to maintain his bill against the city and the People's Company, is not a question of the jurisdiction of the court as a federal court, but relates only to the general authority of the court as a judicial tribunal. In the absence of collusion, the right of a stockholder to invoke the jurisdiction of a circuit court of the United States on the ground of diverse citizenship between himself and his corporation, in a suit founded upon rights which might have been asserted by the corporation, is not open to question. That question was explicitly foreclosed by the decision of this court in *Doctor* v. *Harrington*, 196 U. S. 579, 587. The appellant in its brief asks the court to determine this question of the right to maintain a stockholder's bill upon general principles administered by courts of equity (pp. 60 *et seq.*). Indeed, the principles invoked are not even drawn from the decisions of the federal courts alone, but decisions of the state courts are also referred to, thus demonstrating that the question submitted is a question of equity jurisdiction applicable to the state courts as well as to the federal courts. This is not such a question of jurisdiction as may be certified to this court under the fifth section of the act of 1891. In *Board of Trade* v. *Hammond Elevator Co.*,

198 U. S. 424, 432, Mr. Justice Brown, speaking for the court, said:

> "The proper construction of this section has been the subject of frequent consideration in this court, and it has been definitely settled that it must be limited to cases where the jurisdiction of the federal court, as a federal court, is put in issue, and that questions of jurisdiction applicable to the state courts, as well as to the federal courts are not within its scope."

The rule is based upon the reasoning in the *World's Columbian Exposition* case, 18 U. S. App. 42, where Mr. Chief Justice Fuller pointed out that if the power of the circuit court to hear and determine the cause was shown—as in the case at bar by reason of the original federal question under the contract clause or by reason of diversity of citizenship—but the defendant contended that no case had been made properly cognizable in a court of equity, the true objection was the want of equity and not the want of power, and that therefore the jurisdiction of the circuit court as a federal court could not be said to be in issue within the intent and meaning of the act of Congress. Hence, if the requisite federal question or diversity of citizenship exist, and the only question is as to the right of the complainant stockholder to maintain the particular bill in equity, the jurisdiction challenged is that of the circuit court as a court of equity and not as a court of the United States.

The question as to collusion arises (1) under the fifth section of the act of March 3, 1875, c. 137, 18 Stat. 470 472, and (2) under the ninety-fourth rule in equity.

(1) The act of 1875 provides as follows:

> "that if, in any suit commenced in a circuit court or removed from a state court to a circuit court of the United States, *it shall appear to the satisfaction of said circuit court*, at any time after such suit has been brought or removed thereto, . . . that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed."

This provision of the act of 1875 was not superseded by the judiciary act of 1887–1888, and is still in force. *Steigleder* v. *McQuesten*, 198 U. S. 141, 142–143, and cases cited.

The court has uniformly adhered to the rule of construction of this act of 1875 declared in *Barry* v. *Edmunds*, 116 U. S. 550, 559, where Mr. Justice Matthews said:

> "In making such an order, therefore, the circuit court exercises a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proven, and controlled by fixed rules of law. It might happen that the judge, on the trial or hearing of a cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction,

on this account, 'shall appear to the satisfaction of said circuit court.'"

See also *Deputron* v. *Young*, 134 U. S. 241, 252; *Wetmore* v. *Rymer*, 169 U. S. 115, 122; *Put-in-Bay Water Works &c. Co.* v. *Ryan*, 181 U. S. 409, 431.

In view of this statute, the question of collusion, as a question of the jurisdiction of the circuit court, is whether it distinctly appeared "to the satisfaction of said circuit court" that the suit was a collusive one. In the case at bar this fact clearly did not so appear. On the contrary, the record shows that the court explicitly found and recited in its final decree the fact "that the suit is not a collusive one to confer on a court of the United States jurisdiction of a cause of which it would not otherwise have cognizance" (record, p. 387). Diverse citizenship appearing by proper averments in the bill and proofs, the jurisdiction of the court to determine the issue of collusion raised by the answer cannot be and is not questioned. If the court had found that this suit was a collusive one, instead of the contrary, collusion would then have "appeared to the satisfaction of the circuit court," and the further action of that court might have raised a question of jurisdiction under the act of 1891. So, also, if the court had found and certified facts from which collusion could fairly be said to have distinctly appeared as a matter of legal certainty, there might have been a question whether collusion appeared or ought not to have appeared "to the satisfaction of the circuit court," subject to review by this court, as a question of the jurisdiction of the court within the meaning of the act of 1891. But the issue of collusion was a

question of fact, which the court had jurisdiction to determine under the act of 1875, and its finding on the evidence ought not to be set aside. Having determined that question as it did, it had unquestionable jurisdiction on the ground of diverse citizenship to proceed to a final decree. *Doctor* v. *Harrington*, 196 U. S. 579, 588.

In *Put-in-Bay, etc., Co.* v. *Ryan*, 181 U. S. 409, 428, there was an appeal from a circuit court solely upon the question of jurisdiction, and it was certified—

> "that said appellant denied the jurisdiction of the court over said cause and contended that the court was without jurisdiction upon the grounds that the amount in controversy was in truth and in fact much less than the sum of two thousand dollars ($2,000), exclusive of interest and costs, and that the case had been fraudulently and collusively instituted by the parties thereto for the purpose of creating the appearance of jurisdiction not in fact existing."

Mr. Justice Shiras, who delivered the opinion of the court, referring to the fifth section of the act of 1875, said (pp. 430, 431, 434):

> "The mere denial that the materials sold by the complainant to the railway company were of the value alleged in the bill did not, of itself deprive the court of jurisdiction. Thereby was presented a question of fact into which the court had jurisdiction to inquire. Within the letter of the statute there was a controversy between citizens of different states, in which the matter in dispute was over the sum or value of two thousand dollars. . . .
>
> "It is not clearly shown in this record that, at any time after the suit was brought, it was made to appear, *to the satisfaction of the circuit court* [italics by the court] that the suit did not really and substantially involve a dispute or controversy properly within the

> jurisdiction of said circuit court. On the contrary, it appears that the circuit court was not so satisfied. . . . The case is before us only on the question whether the circuit court had jurisdiction to entertain the said cause and render the decrees so appealed from, and this we answer in the affirmative and direct the appeal to be dismissed."

(2) Nor does any issue of fact arising under denials of due compliance with the ninety-fourth rule involve any question as to the jurisdiction of a circuit court as a court of the United States. The point was presented to the court for decision in *Illinois Central Railroad Co.* v. *Adams*, 180 U. S. 28, 33, where the defense was interposed that the ninety-fourth equity rule as to collusive stockholders' suits had not been complied with, but the court held (p. 34)—

> "that the defense set up under the ninety-fourth rule does not raise a question of jurisdiction, but of the authority of the plaintiff to maintain this bill."

The reasons for so holding were stated in the opinion delivered by Mr. Justice Brown as follows (pp. 34, 35):

> "Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. It exists in the circuit courts of the United States under the express terms of the act of August 13, 1888, if the plaintiff be a citizen of one state, the defendant a citizen of another, if the amount in controversy exceed $2,000, and the defendant be properly served with process within the district. Excepting certain *quasi* jurisdictional facts, necessary to be averred in particular cases, and immaterial here, these are the only facts required to vest jurisdiction of the controversy in the circuit courts. . . . The right to

bring a suit is entirely distinguishable from the right to prosecute the particular bill. One goes to the maintenance of any action; the other to the maintenance of the particular action. Thus it was held in the case of *Smith* v. *McKay*, 161 U. S. 355, and *Blythe* v. *Hinckley*, 173 U. S. 501, that it was not a question of the jurisdiction of the circuit court that the action should have been brought at law instead of in equity. The question in each case is whether the plaintiff has brought himself within the language of the jurisdictional act, whatever be the form of his action, or whether it be at law or in equity. *The objection that plaintiff has failed to comply with the ninety-fourth rule may be raised by demurrer, but the admitted power to decide this question is also an admission that the court has jurisdiction of the case.*"

The right of a stockholder to invoke the equity jurisdiction of the federal courts in any case is also governed by section 723 of the Revised Statutes, which provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." This issue was also raised by the answer of the city to the amended bill (p. 99). But the question whether the remedy should be at law or in equity is not a question of federal jurisdiction within the meaning of the act of 1891, and it has been explicitly so decided by this court. *Smith* v. *McKay*, 161 U. S. 355, 357, and cases cited *supra*.

II.

There is no proper certificate showing what specific or definite question of federal jurisdiction in issue in the court below was intended to be certified to this court.

This appeal having been taken under section 5 of the judiciary act of March 3, 1891, 26 Stat. 827, as of a

case "in which the jurisdiction of the court is in issue," it is subject, as we have already seen, to the provision that "in such a case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

Certain propositions concerning the jurisdiction of this court in cases of this kind have been definitely settled. A formal certificate of the jurisdictional question by the court below, or an equivalent therefor, is an essential to the exercise of jurisdiction by this court. *Maynard* v. *Hecht*, 151 U. S. 324, 328; *Courtney* v. *Pradt*, 196 U. S. 89, 91; *Trenchard* v. *Kell*, 202 U. S. 613. In the absence of a sufficient formal certificate, its equivalent in an equity case must be found, if at all, in the explicit terms of the final decree or of the order allowing the appeal. *Huntington* v. *Laidley*, 176 U. S. 668, 676; *Arkansas* v. *Schlierholz*, 179 U. S. 598, 601; *Courtney* v. *Pradt*, 196 U. S. 89, 91. As Mr. Justice Gray said in the first mentioned case:

> "This may appear in either of two ways; by the terms of the decree appealed from and of the order allowing the appeal; or by a separate certificate of the court below."

Such certificate or its equivalent "must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction." *Huntington* v. *Laidley*, 176 U. S. 668, 676; *Courtney* v. *Pradt*, 196 U. S. 89, 92. It is insufficient to certify the question of jurisdiction generally "without defining or indicating any specific question of jurisdiction." *Chappell* v. *United States*, 160 U. S.

499, 508–509; *Filhiol* v. *Torney*, 194 U. S. 356, 358–359; *The Bayonne*, 159 U. S. 687, 693. There must also be a statement of a *definite* question; that is, "the precise question, clearly, fully and separately stated. No mere suggestion that the jurisdiction of the court was in issue will answer." *Shields* v. *Coleman*, 157 U. S. 168, 177; *Chappell* v. *United States*, 160 U. S. 499, 508; *Arkansas* v. *Schlierholz*, 179 U. S. 600, 601. The question of jurisdiction must also have been so "plainly and distinctly" specified "that no further examination of the record would be necessary." *Van Wagenen* v. *Sewall*, 160 U. S. 369, 373. The question thus sent up must be a question of *federal* jurisdiction, that is, of "the jurisdiction of the circuit court as a court of the United States, and not in respect of its general authority as a judicial tribunal" or a court of equity. *Courtney* v. *Pradt*, 196 U. S. 89, 91, and cases cited; *Illinois Central Railroad Co.* v. *Adams*, 180 U. S. 28, 34–35; *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424, 432. At the present term in *Nichols Lumber Co.* v. *Franson*, decided December 3, 1906, Mr. Justice White, speaking for the court, said:

> "We deem it the better practice in every case of direct review on a question of jurisdiction to make apparent on the record by a bill of exceptions, or other appropriate mode, the fact that the question of jurisdiction was raised and passed upon *and the elements upon which the decision of the question was based.*"

Does the record in the case at bar fulfill the requirements of these settled rules? Is it distinctly and unequivocally shown that the court below sends up for consideration any definite question of jurisdiction? Is

the precise question so clearly, fully and separately stated in the formal certificate (p. 394), or in the final decree (p.387), or in the order allowing the appeal (p. 392) that no further examination of the record is necessary to reveal it? Do the elements upon which the decision of the question of jurisdiction was based appear in any appropriate mode? Is the question intended to be certified one as to diversity of citizenship or as to amount in controversy or as to failure to comply with the ninety-fourth rule or as to alleged collusion?

The formal "certificate" (p. 394) states only that at the final hearing the appellant objected to the jurisdiction of the court as a court of the United States to hear and determine the cause, and asked the court to dismiss the cause for want of jurisdiction, that an appeal was prayed and granted solely upon the question of the jurisdiction of the court as a court of the United States, that certain designated testimony, comprising 230 printed pages, was the only evidence on the question of the jurisdiction of the court to hear and determine the cause, and that certain enumerated portions of the record 56 in number and comprising 397 printed pages, which the clerk is directed to certify and transmit to this court, contain all the records of the court that have any reference to the jurisdiction of the court in this cause. The record so certified is practically the entire record in a protracted litigation upon the merits of a bill for an injunction, showing the investigation and determination of numerous controverted questions of law and fact, many of which do not even

remotely touch any question of jurisdiction, federal or otherwise. Substantially all of the averments of the bill (record, p. 2) and the amended bill (p. 75) were put in issue by the answer to the original bill (p. 56) and the answer to the amended bill (p. 94). These averments were of jurisdictional facts relating to the jurisdiction of the court both as a federal court and as a court of equity, and also of facts relating to the merits of the complainant's claim, and the evidence (pp. 140 *et seq.*) was addressed to the proof of all these averments. No attempt has been made, except in the brief of counsel, to specify any particular portions of the evidence as relating to a supposed jurisdictional question. In all this voluminous record there is no plea to the jurisdiction or motion to dismiss for want of jurisdiction presenting to the court below any definite question of jurisdiction upon specific grounds. In this situation, is a formal certificate sufficient which states nothing more than that the entire record of an essentially non-federal litigation on the merits contains somewhere a question of federal jurisdiction by reason of an objection at the final hearing of which the form and contents is nowhere stated, that the appeal was taken solely upon this question of jurisdiction, and that such question only is sent up for decision?

Tested by the rules stated above, it is submitted that the certificate in the case at bar falls far short of the statutory requirement. A certificate which contains no statement of any specific or precise question of jurisdiction cannot be said to state a "definite" question of jurisdiction. It cannot be said that in such a certificate "the precise

question" is so "clearly, fully and separately stated" that "no further examination of the record would be necessary."

A simple perusal of the final decree (p. 387) also shows its insufficiency as an equivalent for the required certificate. It adjudges an ordinance of the city of Chicago to be void under the constitution and laws of Illinois, and restrains its enforcement by an injunction in favor of the complainant. It contains recitals of various findings and conclusions upon the merits of the bill, as well as of jurisdictional facts, some of which, *e. g.*, as to diverse citizenship and the amount in controversy and collusion, relate to the federal jurisdiction, whilst others, *e. g.*, as to compliance with the ninety-fourth equity rule and the inadequacy of the remedy at law, relate to equity jurisdiction.

The order allowing the appeal (p. 392) is equally insufficient. It states that, upon consideration of the petition for appeal and the assignment of errors, the appeal is allowed solely upon the question of the jurisdiction of the court as a federal court "to hear and determine this cause between the parties to the bill as presented therein."

It does not specify any *definite* question of jurisdiction or whether the question was as to diversity of citizenship or because the People's Company should be aligned on the same side as the complainant or because the amount in controversy was insufficient or because of collusion. The verified bill (p. 2, amended bill, p. 75) averred in proper form diversity of citizenship, sufficiency of matter in dispute, compliance with the ninety-fourth

equity rule, including the absence of collusion, invalidity of the ordinance under the constitution and laws of Illinois, the necessity for an injunction to avoid a multiplicity of suits, the absence of an adequate remedy at law, and the certainty of irreparable injury from an enforcement of the void ordinance. The answer put all these averments in issue (pp. 94, 98–102). By reference to the recitals of the final decree (p. 387), it will be seen that each and all of the averments of the bill were found to be true. If true, undoubtedly the court had jurisdiction as a federal court and also as a court of equity to grant the injunction.

The proper office of the assignments of error, twelve in number, is not to indicate what questions have been in issue in the court below but what questions are desired to be raised in the appellate court. Whether any question was duly put in issue is to be determined by the pleadings and the record and not by what the defeated party sees fit to assign as an error. In other words, an assignment of error does not show that the error suggested was based on a question duly "put in issue." Hence, in the case at bar, what question of jurisdiction as a federal court was in fact put in issue and intended to be certified to this court cannot be answered without searching the record. The bill and amended bill, which together constitute but one pleading (*French* v. *Hay*, 22 Wall. 238, 246) and comprise 55 printed pages (pp. 2–46, 75–86), must be examined to ascertain whether sufficient averments were made as to jurisdiction. Turning to the answer to the amended bill (p. 94), it appears that issues

were raised as to diverse citizenship, as to the amount in controversy by reason of complainant's interest in the company, as to compliance with the ninety-fourth equity rule, including the absence of collusion, and as to the inadequacy of the remedy at law, as well as to the facts constituting the grounds of relief.

In the absence of a certificate showing a "definite" question of federal jurisdiction, so "clearly, fully and separately stated" by the court below after its final decision "that no further examination of the record would be necessary," all of these questions are possible subjects of inquiry in order to determine what question was intended to be certified. A similar situation existed in *McHenry* v. *Alford*, 168 U. S. 651, 659, where the Circuit Court of Appeals certified the question whether the circuit court had jurisdiction, and Mr. Justice Peckham enumerated various possible questions relating to the jurisdiction of the court below, and said:

> "All these questions are possible subjects of inquiry in order to answer the general question submitted to us. We should not be asked to grope our way through the papers submitted and examine every objection that imagination could raise, with no hint as to what, if any, objection is really supposed to exist."

Of course, when the judgment itself refers to grounds of decision and shows the specific and definite elements upon which the decision of the question of jurisdiction was based, the court is able to determine with reasonable certainty what the court actually ruled. Thus, in *Re Lehigh Min. & Mfg. Co., Petitioner*, 156 U. S. 322, 327, the judgment "recited that, for reasons

in writing filed as part of the order, the court considered that it had no jurisdiction of the case, and therefore dismissed it for want of jurisdiction."

In *Interior Construction Co.* v. *Gibney*, 160 U. S. 217, 219, there was a plea to the jurisdiction upon specified grounds, and a dismissal based upon the plea, and the record showed that "the only matter tried and decided in the circuit court was a demurrer to the plea to the jurisdiction."

In *Huntington* v. *Laidley*, 176 U. S. 668, 676, Mr. Justice Gray said:

> "The final decree of the circuit court of the United States recited that, at the hearing upon the petition for a rule for an attachment for contempt, the court examined the bill and amended bills and answers thereto, and the undisputed records of the suit in the state court; and that from such examination it appeared to the satisfaction of the court that this suit did not really and substantially involve a dispute or controversy properly within its jurisdiction, because of the pendency of those suits in the state conrt, and for that reason the court was of opinion that it was required by section 5 of the act of March 3, 1875, c. 137, to dismiss the suit; and it was therefore, upon the court's own motion, adjudged and decreed that the suit be dismissed."

In *Excelsior W. P. Co.* v. *Pacific Bridge Co.*, 185 U. S. 282, 284, it appeared that "upon argument, which was upon the question of jurisdiction alone, the court held that the suit was not one arising under the patent laws but solely out of a contract; that the court had no jurisdiction, and a decree was entered to that effect."

In *Hennessy* v. *Richardson Drug Co.*, 189 U. S. 25, 33, the case had been dismissed, and

> "The decree stated among other things: 'And the court finds that neither the bill, nor the bill as amended, nor the evidence shows the citizenship of complainants, or any of them so as to confer jurisdiction upon this court.'"

In *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487, 492, as Mr. Justice White observed,

> "The judgment of dismissal and the prior proceedings clearly exhibit the ground upon which the judgment was based, and plainly make apparent on the record the fact that the only matters tried and decided in the circuit court were demurrers to pleas to the jurisdiction."

It is true that under the act of February 25, 1889, c. 236, 25 Stat. 693, this court had jurisdiction of direct appeals from the circuit courts in cases "in which there shall have been a question involving the jurisdiction of the court," without a certificate of such question, and this court was under the necessity of ascertaining and deciding the question of jurisdiction upon the whole record. *Mississippi Mills* v. *Cohn*, 150 U. S. 202, 203. However, "the act of 1891 was framed in this regard in view of the former act" and to relieve this court of that necessity. *Maynard* v. *Hecht*, 151 U. S. 324, 326–328. "Indeed," as Mr. Justice Brown said in *Van Wagenen* v. *Sewall*, 160 U. S. 369, 373,

> "it appears to have been the very object of the fifth section of the act of 1891 to have the question of jurisdiction *plainly and distinctly certified* to us, or at least to have it appear so clearly in the decree of the court below, that no other question was involved,

that no further examination of the record would be necessary."

The petition for appeal in the case at bar (p. 389) contains no statement of any question but merely represents that the court erred in that it "assumed and asserted jurisdiction as a circuit court of the United States" without indicating or specifying where or how or why, except by reference to the assignment of errors filed with the petition, and prays for an appeal "solely on the question of jurisdiction" and that "said question of jurisdiction" be certified.

With respect to the assignment of errors, it may be repeated that the equivalent for the required certificate in an equity case can exist only in the explicit terms of the final decree or of the order allowing the appeal (*Huntington* v. *Laidley*, 176 U. S. 668, 676; *Courtney* v. *Pradt*, 196 U. S. 89, 91, and cases cited), and that, therefore, the assignments are not entitled to be considered as equivalent to the required certificate unless they are so incorporated in the order allowing the appeal by appropriate words of reference as to show that the court intended to certify the assignments as presenting the questions *put in issue* and decided. It is submitted that the mere recital in the order allowing the appeal that it is "upon a consideration of the assignment of errors" is not sufficient to show that the questions covered by the assignments were duly put in issue or to indicate to this court that the court below intended to certify each and every assignment of error. If any such omnibus certification is intended, the court below should say so in express terms.

The present order allowing the appeal contained no expression indicating the intention of the court to rule upon or certify all the *twelve* assignments of error (p. 390), and therefore the appellant's assignments cannot be considered as the equivalent of a certificate by the court below. In *Maynard* v. *Hecht*, 151 U. S. 324, 328, Mr. Chief Justice Fuller said :

> " It appears that the petition for writ of error was filed in this case July 6, 1891, together with a bond for the prosecution thereof, and an assignment of errors, and this petition and the assignment raised the question that the matter in dispute in the cause did not exceed, exclusive of interest and costs, the sum of two thousand dollars; but the trial judge made no endorsement thereon. The writ specifies no particular ground of error, and it is upon the writ that the allowance was entered November 16, 1891, the judge certifying that on that day it was presented to him 'for allowance and signature.' But in any view the absence of the formal certificate cannot be helped out by resort to these papers."

In *The Bayonne*, 159 U. S. 687, where the formal certificate was held unavailing because made too late, this court was asked to consider the petition for appeal as equivalent thereto. The order of the court below was " appeal allowed " endorsed on the petition, and it was held that the petition could not be treated as equivalent to the required certificate, although the prayer for appeal was " upon the ground that this court was without jurisdiction to make the said decree," because, as Mr. Chief Justice Fuller said (p. 693), " it specified no question of jurisdiction." This court was also asked to regard the assignment of errors as such equivalent, but Mr. Chief Justice Fuller said (p. 693):

> "We do not, however, regard the assignment of errors and the action of the court in directing it to be filed, as a compliance with the statutory provision and equivalent to the certificate required."

In *New York, &c., R. Co.* v. *Weisberg*, 191 U. S. 558, the record shows that the case was an action at law in a circuit court founded on diverse citizenship, that the defendant moved to dismiss the complaint on the ground that diverse citizenship was not shown to exist, that this motion was overruled and judgment was entered for the plaintiff, that there was no certificate of the jurisdictional question, and that the assignment of errors filed with the petition for a writ of error related only to such jurisdictional question. If ever an assignment of errors could of itself be taken as equivalent to the required certificate, that was such a case; but the decision of this court was :

> "Dismissed for the want of jurisdiction. *Maynard* v. *Hecht*, 151 U. S. 324; *The Bayonne*, 159 U. S. 687, 692; *Chappell* v. *United States*, 160 U. S. 499, 507."

The opinion of the court below in the case at bar, filed four days before the entry of the final decree, cannot be regarded as equivalent to the required certificate. The court did indeed discuss the question whether the suit was a collusive one to confer jurisdiction of a case of which the court would not otherwise have cognizance, and gave reasons based on the testimony for the conclusion that the suit was not collusive. The same situation existed in the case of *Merritt* v. *Bowdoin College*, 167 U. S. 745. There the appeal was limited to the single question of jurisdiction, and a formal certificate was

made of the question whether the case was a collusive one to confer jurisdiction of a case of which the court would not otherwise have cognizance. The certificate was held insufficient because it was not made during the term at which the final decree was entered. The record of that case shows that the court below rendered an elaborate opinion upon the question of collusion before the final decree, and the briefs of counsel show that it was strenuously urged in this court that such opinion was equivalent to the required certificate, but without avail. The appeal was dismissed for the want of jurisdiction on the authority of prior cases.

In view of the numerous decisions of this court pointing out the practice and the necessity for clearly specifying the definite question of jurisdiction as a court of the United States, which the court below intends to certify to this court, there is no reason why any exception should be made in the present case. It was perfectly easy to have certified the question of collusion or alignment or citizenship. The want of definiteness in the situation before the court cannot be better evidenced than by the attempt on the part of appellant in the brief now filed to discuss, under the existing certificate, not only the question of collusion but questions of general equity jurisdiction applicable to all courts of equity.

III.

As to the necessity for a new suit on the ground that the pending suit, in which the bill had been dismissed for want of jurisdiction, did not adequately protect the interests of the company and its stockholders.

It was one of the principal contentions on the part of the city of Chicago in the court below and is repeated

in this court (*vide* appellant's brief, pp. 60 *et seq.*) that the refusal to sue by the board of directors and stockholders of the People's Company was proper, and that "the undisputed evidence in this record shows that the corporate rights were being adequately protected by the officers of the People's Company at the time the bill of complaint was filed, and therefore a stockholder had no standing in the federal court" (p. 60). Indeed, the city contended in one breath that the action of the board of directors in refusing to sue was proper, and yet in the next breath that the refusal to sue was so improper as to constitute evidence of collusion on the part of the company and the complainant. If the refusal to sue was proper, obviously no occasion or motive would have existed for collusion. It is, of course, only a sham or unreasonable refusal in a case where the company itself ought to sue that can have any legitimate tendency to prove collusion or any motive for it. Although the question as to whether or not the board of directors and stockholders should have directed a new suit to be brought is not one of jurisdiction of the circuit court as a federal court, but one of general equity jurisprudence, the question will nevertheless be considered as showing good faith and the absence of any collusion.

The court below in its opinion overruling the demurrer to the original bill fully discussed the contention urged on the part of the city that there was no necessity or excuse for any new suit on behalf of the company and that consequently the refusal of the board and stockholders was right, and in so doing used the following language (record, p. 52):

"The fourth point against jurisdiction is the one on which greatest stress is laid. In the suit previously heard here, pending now on appeal by the Gas Company in the Supreme Court, the Gas Company challenged the validity of the ordinance, both because it was said to impair the company's contract right under its charter, and because the City Council was without power delegated to it by the State to regulate the prices of gas. The court held in that case, that no charter contract as claimed existed, and so holding declined to hear or pass upon the question of delegated authority, for the reason that the cause came into the federal court solely as one arising under the Constitution and laws of the United States, wherefore the ground of federal jurisdiction failing, the other question involved—solely one of state law—must go out of court also, though without prejudice to a new suit in the proper forum.

I think, under such circumstances, it to be unquestioned, that had there been no appeal, and had the company refused to bring a new suit in the appropriate tribunal, a suit, such as this, would lie at the instance of a stockholder. But the insistence of counsel is, that the appeal, by the Gas Company to the Supreme Court, on both grounds, shows that the company is still seeking, in the Supreme Court of the United States, to invalidate the ordinance as one not delegated under the laws of Illinois to the city council, and in so doing meets fully its duty in the premises to its stockholders. The trouble is that such appeal does not fully meet the measure of the company's duty. The suit pending on appeal will not bring a judgment touching the power of the city council, if the impairment of contract question be determined against the company. This court has so held, and there is no reason to believe that the Supreme Court will hold otherwise. At any rate,

until it is held otherwise, the former holding remains the law of the case.

But if the company has taken no measure conformable to law to prevent the wrong threatened, the right of the stockholder to take such measures cannot be disputed, and a measure conformable to law is to be tested, not by the company's opinion of the law, but by the law itself. The stockholder is entitled to the law, not to a mistaken view of the law; to an action that will lie, not to an action that must be dismissed for want of jurisdiction in the court resorted to."

The exact situation as it existed in January, 1903, before the amendment of the decree by consent should be appreciated as well as the vital importance to the company and its stockholders of having the ordinance of October 15, 1900, declared invalid. It will then be manifest that it was the duty of the officers and directors of the People's Company to have instituted a new suit in a proper court in January, 1903, in order to protect the interests of the company and its stockholders in accordance with Mr. Mills' request. The effect of the reduction of the revenue of the company if the ordinance were valid and enforced was enormous. A reduction of twenty-five cents per thousand cubic feet was shown to equal $2,750,000 per annum (p. 200), being the equivalent of over eight per cent. upon the capital stock of the People's Company (p. 198). The number of the company's customers was shown to be upwards of three hundred and fifty thousand (350,000), whose average consumption was only $2.50 per month, or between $26 and $28 per annum (p. 200). It was also shown that most of these custom-

ers were of small means (pp. 201, 224), and practical experience had demonstrated the difficulty, if not the impracticability, of collecting arrearages (pp. 201, 224). If the company were compelled to comply with the ordinance pending litigation, a few months' delay would have involved a loss of millions of dollars and probably bankruptcy, for the sums accruing for the most part could never be collected (pp. 201–202, 224). Hence, the very strongest possible reasons existed for the interposition of a court of equity in order to prevent irreparable loss and damage and a multiplicity of suits. In addition, the ordinance was designedly framed so as to be most oppressive. It imposed "a penalty of not less than twenty-five dollars ($25), nor more than two hundred dollars ($200) for each and every offence" (p. 79). In other words, the penalties which the representatives of the city were threatening to endeavor to collect, if an injunction were not issued, would amount to $8,750,000 per day at the rate of a $25 penalty "for each and every offence," and to $70,000,000 per day at the rate of a $200 penalty "for each and every offence," for the company has 350,000 customers. Thus, by one day's violation of this ordinance the company might incur the practical forfeiture and confiscation of all its property. *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 100. Under such circumstances, it was surely natural that the stockholders should be most anxious to protect their interests and to run no unnecessary risk.

The bill in the prior suit had been dismissed for want of jurisdiction, and it was practically certain that this court on the then pending appeal of the People's Com-

pany would, as the decree then stood, limit the point which it would consider "to the naked question of jurisdiction" (p. 46), and reverse with instructions to the lower court to decide upon the merits. *Huntington* v. *Laidley*, 176 U. S. 668, 680; *Illinois Central Railroad Co.* v. *Adams*, 180 U. S. 28, 41; *Excelsior W. P. Co.* v. *Pacific Bridge Co.*, 185 U. S. 282, 295; *Doctor* v. *Harrington*, 196 U. S. 579, 589.

The decree in the prior suit, moreover, had definitely settled nothing upon the merits even as to the alleged contract right, for a decree dismissing a bill for want of jurisdiction does not constitute *res adjudicata* and in no way concludes the right of action. *Smith* v. *McNeal*, 109 U. S. 426, 429; *Illinois Central Railroad Co.* v. *Adams*, 180 U. S. 28, 35. The circuit court had ruled in its opinion filed January 15, 1902, that the question of power of the city council could not be considered in the pending suit (p. 301) and that relief to the company must be found in a new suit in the state courts (p. 302), and, apparently acquiescing in this ruling, the People's Company had on June 5, 1902, amended its bill and omitted all allegations as to the want of power and prayed for relief only under its alleged contract right (pp. 303, 360). Yet, the company had failed to begin any such suit, and was staking the interests, if not the solvency, of the company on an appeal which was unlikely to result in any definite decision on the merits.

As it ultimately turned out, the wisdom of the advice given to Mr. Mills and submitted to the company was demonstrated. This court affirmed the decree in the suit of the People's Company and declined to pass

upon the question of power (194 U. S. 1), and if it had not been for the pendency of the suit now at bar, the ordinance of October 15, 1900, would have at once gone into effect and irreparable damage would have resulted therefrom. There can be no doubt that the duty of the company to sue would have been obvious and indisputable if the directors could have foreseen the affirmance by this court.

It is true that a stay had been granted on the pending appeal (p. 257), but that stay would necessarily have been vacated as soon as this court affirmed the lower court and likewise if this court reversed merely on the question of jurisdiction. Indeed, the very fact that there was a stay in the pending suit rendered it all the more the duty of the managers of the company to avail of that period of protection to seek and obtain an adjudication upon the fundamental question of power. If the company had waited two years without doing anything, without instituting a new suit involving the question of power notwithstanding the clear intimation of Circuit Judge Grosscup that a new suit involving that question should be brought in a state court, would any court of equity have issued a preliminary injunction? Would it not have been urged most forcibly by the city and would it not in all probability have been held by the court that the company had delayed too long and that as it had been held that the question of power was not involved in the prior suit, it ought promptly to have instituted a new suit in a state court and not have wasted years in fruitless litigation? What possible advantage could the company reap by delay in instituting a new

suit on the question of power commensurate with the risk involved in delay? Was not Mr. Mills' counsel, therefore, right in his judgment that the interests of the company and its stockholders would not be served by delay, but might be greatly prejudiced thereby (pp. 225-256)? Can any one imagine a more perilous situation for such a company than that which would have existed if the present suit had not been pending when this court affirmed the decree in the prior suit? What answer would directors then have been able to make to the suggestion that in common prudence they ought in the meantime to have anticipated the result and instituted a new suit to protect the company and secured an adjudication on the question of power? The only thing that saved the company from irreparable loss after the affirmance by this court of the decree in the prior suit was the fact that in the meantime Mr. Mills had secured an adjudication that the city council had no power to pass the ordinance (p. 55) and secured an injunction in his suit. That adjudication, and that alone, saved the company from ruin.

It is earnestly submitted that under the circumstances disclosed in the case at bar, it was clearly the duty of the managers of the People's Company to have brought a new suit in order to test the question of the power of the city council, as requested by Mr. Mills, and that upon their failure to do so, he, vitally interested as the largest stockholder of the company, was fully justified in filing his bill to protect his own interests and those of other stockholders.

The situation facing Mr. Mills was most serious. He

had a fortune of over $2,200,000 invested in the stock of the People's Company. He was the largest individual stockholder and naturally anxious and concerned about its interests. As he pointed out in his letter, the ordinance would reduce the gross income of the company one-quarter and the net income much more (pp. 161, 200). The loss involved by delay in collecting bills during the pendency of litigation if the company meanwhile were compelled to abide by the ordinance would have been tremendous (p. 202), amounting to several million dollars (p. 224), and a refusal or failure to comply with the ordinance, if only for the purpose of having the question tested in good faith in a court of law, might have involved the ruin of the People's Company by reason of the penalties incurred. The business of the company is approximately 11,000,000,000 cubic feet per year (p. 200), and the amount involved represented a reduction of revenue of $2,750,000 per annum, or eight per cent. upon its capital stock. There can be no reasonable doubt, therefore, that from the standpoint of Mr. Mills, the questions involved were of vital and enormous importance, and that he was justified in the anxiety which prompted him to consult counsel and to institute the present suit upon the refusal of the directors and stockholders to do so.

IV.

As to the contention that the refusal of the board and stockholders to sue was in pursuance of a collusive agreement.

The bill in this suit as originally filed contained two separate and distinct grounds of jurisdiction, the one

impairment of the contract right, and the other diversity of citizenship (*supra*, p. 2).

The decree in the prior suit dismissing the bill "for want of jurisdiction" was not a bar to a new suit in a court of the United States by the company itself, nor in any event for divisional relief under the contract, if the company elected to demand it. The company, itself, therefore, could have filed in a court of the United States substantially the same bill of complaint that Mr. Mills originally filed, praying divisional relief under its alleged contract right. It necessarily follows that diversity of citizenship was not essential or controlling as the basis of the jurisdiction of the circuit court to hear and determine the controversy, and that, so far as jurisdiction as a federal court was concerned, there was really no occasion or motive for collusion. It will, therefore, be readily understood why the difference between the state and federal courts was never even discussed or considered (p. 197) except that Mr. Mills was advised that if he sued, he could resort to a federal court.

In *Simpson* v. *Union Stock Yards Co.*, 110 Fed. Rep. 799, 801, the court said:

> "Aside from these facts, there could have been no collusion, because there can be no collusion without reason or motive, or to subserve some purpose. The company, although a corporation and citizen of Nebraska, could have brought this action in this court, as complainant, against the Nebraska citizens and officials. The right of the state to pass the act in question is a federal question, concerning which this court would take jurisdiction regardless of citizenship; and, taking jurisdiction by reason of the federal question, this court would also take jurisdic-

> tion of the question of whether the act was legally passed; and it would retain jurisdiction, and adjudicate that question, even though the federal question was held to be wholly without merit. All recognize the correctness of this. Therefore it is wholly immaterial whether Mr. Simpson brought the action in this court, or whether the company brought it."

See also *Illinois Central Railroad* v. *Adams*, 180 U. S. 28, 33-37; *Ball* v. *Rutland R. Co.*, 93 Fed. Rep. 513, 515; *Kimball* v. *City of Cedar Rapids*, 99 Fed. Rep. 130, 131-132.

The question of collusion is, of course, to be determined by the conditions existing when Mr. Mills requested the board of directors and the stockholders of the People's Company to institute a new suit, and when he filed his bill, June 8, 1903, and not by subsequent developments. As Chief Justice Marshall said in *Mollan* v. *Torrance*, 9 Wheat. 537, 539:

> "It is quite clear, that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events."

See also, *Kirby* v. *American Soda Fountain Co.*, 194 U. S. 141, 145; *Hardenbergh* v. *Ray*, 151 U. S. 112, 118; *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138, 144; *Mexican Central Ry.* v. *Pinkney*, 149 U. S. 194, 200.

The determination of this question of collusion does not depend upon whether the actual interests of the People's Company and the complainant were in fact identical at the time the bill was filed, or have become so, but solely upon the question whether demand on the company to institute a new suit was made in good

faith and was refused by the corporation without collusion with the complainant. It is submitted that if, as we have seen, Mr. Mills was reasonably warranted in assuming on the advice of his counsel that this court on the pending appeal might "limit the point which it will consider . . . to the naked question of jurisdiction," that the pending suit did "not involve any question as to the power of the common council of the city of Chicago to reduce the charges of our company" (Mr. Mills' letter of December 16, 1902, pp. 46, 160), and that delay until the pending appeal could be heard by this court was dangerous and not for the best interests of the People's Company (pp. 255–256), then there could be no question as to his right to sue unless he was acting in collusion with the company.

The event proved that the view of Mr. Mills' counsel was correct, that the directors ought to have sued, that the present suit was absolutely necessary, and that if it had not been brought, the ordinance would have been enforced to the irreparable damage of the company immediately upon the affirmance of the decree in the prior suit. The stay granted in the prior suit fell with the decree of affirmance.

As we have seen, the decree in the prior suit had dismissed the bill for want of jurisdiction and all parties then believed that such was the intention of the learned circuit judge who decided the case (pp. 147, 151, 221, 225, 228, 255-257, 261). Such belief was based upon the opinion filed July 30, 1902, sustaining the demurrer to the amended bill in that suit, the concluding sentence of which reads as follows (p. 364):

> "The demurrer to the amended bill will be sustained, and the bill dismissed for want of jurisdiction in this court over the cause of action set forth."

The proofs also show that only on the argument of the demurrer in the present suit, on December 5, 1903, was it ascertained for the first time that the decree as entered did not correctly recite the intention of the court (p. 261). The decree was then amended *nunc pro tunc* by the consent of the city, and the record before this court accordingly corrected. This was a distinct advantage to the city, for a decree dismissing a bill for want of jurisdiction did not constitute *res adjudicata* on the merits either in a state or federal court. That this had an important, if not controlling, effect in this court cannot be doubted, and the city should hardly be allowed now to urge that this amendment made no change in the existing situation.

In considering the bearing and effect of this vital feature as to the form of the decree in the prior suit, most prominent at the time and relied on by all the parties, the fact should not be overlooked that the city itself was responsible for the condition of the decree. It is elementary in equity practice that the prevailing party is bound to see to it that a proper decree is entered, and particularly so when large public interests are involved. The duty of framing a decree duly reciting the actual finding and decision of the court and constituting *res adjudicata* is not cast upon the defeated party any more than it is imposed upon the court. Had the city called the court's attention to the error at the time the decree was entered or

at any time afterwards, the advice given to the directors and stockholders of the People's Company by their counsel might have been different and the request for a new suit might then have been complied with. At any rate, an entirely different situation would have existed.

There can be no doubt from the evidence that Mr. Mills consulted counsel of his own motion and for his own account, that he "had nothing to do with the company," that the suit was not brought at its request, that he had no agreement with it directly or indirectly to reimburse him the expenses of the suit (pp. 164, 174, 180, 181, 222), and that the company has never directly or indirectly contributed to the expenses of the suit (pp. 180–181, 222).

The city contends that the refusal of the directors of the People's Company to begin a new suit was not *bona fide*, but the complainant is not called upon to justify or uphold the attitude of the People's Company in 1903. It is enough for him to show that he did not enter into any collusive agreement with it, for if he acted honestly and without collusion, the motives or mental operations of the directors of the People's Company or their erroneous views of the law are of no weight whatever. As appears from uncontradicted evidence, Mr. Mills' counsel then differed with the counsel of the company (pp. 255-257, 263). Subsequent developments showed the view of Mr. Mills' counsel to have been correct, but no one could assume to prophesy, and neither counsel could be criticized for not anticipating that the amendment of the decree in the prior suit, December 5, 1903, on the eve of the argument in Washington, would (as it undoubtedly did)

deprive the appeal of the reasonable certainty of success, but even the contemplated success would have been barren if the court had reversed solely on the question of jurisdiction. If counsel for the company ought to have anticipated the affirmance of the decree, then indisputably the company should have complied with Mr. Mills' request, and appellant's brief virtually so concedes (at bottom of p. 65).

The reasons why the company refused to sue were testified to at length and were summarized in Mr. Meagher's testimony quoted above at pp. 10–13.

The company at that time not only had pending its appeal from the adverse decree in the prior suit involving the validity of this ordinance, with a stay pending appeal under a bond for $600,000, but also litigation with the state in *quo warranto* proceedings which vitally affected its organization and its right to exist (pp. 253, 257; 205 Illinois, 482). The political condition of affairs in Chicago was supposed to be delicate and public opinion was assumed to be more or less prejudiced against the People's Company (pp. 152, 228). Further litigation by the company itself appeared imprudent and injudicious, first, because it might tend to inflame an already hostile public opinion, and, secondly, because it might prejudice the pending appeals and the pending stay (pp. 161, 204, 228, 256, 279). The representatives of the company undoubtedly assumed that, if it brought a new suit, the fact would be urged upon this court on behalf of the city as contradicting the plea that the court should in justice consider the whole case and adjudge the merits of the con-

troversy, and the company also undoubtedly apprehended that if it sued an application might then at once be made to vacate the pending stay if an injunction were refused on the merits in the state court (p. 257). A perusal of Mr. Meagher's testimony cannot fail to convince the court that he and his associates, Judge Sears and the late Judge Moran, were acting in entire good faith and sincerity, and that they advised what they believed to be for the best interests of their client, the company (pp. 255 *et seq.*, 263). That the directors acted on the advice of counsel of repute is not challenged (pp. 204, 256-257, 278-279). The company's representatives assumed that the decree as entered correctly recited the intention of the court (pp. 147, 151, 221, 225, 228, 255-257, 261), they were apparently confident that the decree must be reversed (pp. 228, 255-257, 260, 261), they thought that the mere fact of reversal would help the company in public opinion (pp. 255-257), and we now find the city contending that the action of the board was proper (see appellant's brief, p. 60).

On the other hand, Mr. Mills' counsel looked at the situation solely from the legal standpoint, and believed that delay would be prejudicial to the interests of the company and its stockholders (pp. 255–256); and he, therefore, insisted, on behalf of his client, in a matter jeopardizing over $2,200,000 of property value, that a new suit should be promptly brought and no further risk run. The result, as we have seen, showed the correctness of this view, and that the company ought to have complied with Mr. Mills' request.

The city nevertheless contends that, although the

refusal to sue was proper, nevertheless certain facts disclosed in the evidence tend to establish collusion between the complainant and the People's Company, and the principal facts relied on in support of this contention are as follows: (1) that complainant's counsel argued in this court the appeal of the People's Company, (2) that the officers of the company in January, 1906, expressed a desire that the complainant should prevail in this suit, (3) that the vice-president of the company contributed to the expense of this suit, and (4) that Mr. Mills testified that the suit was brought to confer jurisdiction on a court of the United States of a case not otherwise cognizable by it.

1.

As to the employment of complainant's counsel to argue in this court the appeal of the People's Company.

After the present suit had been brought on behalf of Mr. Mills and all other stockholders, June 8, 1903, the People's Company retained the complainant's counsel, Mr. Guthrie, to argue its appeal in the prior suit, and in January, 1904, Mr. Guthrie did argue that case before this court. It appeared that Mr. Guthrie had not been employed or consulted or conferred with by the People's Company in relation to the prior litigation in any way or manner until after the commencement of the present suit (pp. 204, 205, 206, 221, 225, 226, 252, 258), and then only because Mr. Meagher, the counsel of the People's Company, whose appearance had been entered in this court in September, 1902 (p. 262), was ill and about to go to Europe for his health and felt that he required the assistance of counsel in this court where the appeal was

shortly coming on to be heard (pp. 257–258). Upon the point that Mr. Guthrie had not been acting as counsel for the company, Mr. Meagher testified as follows (p. 252):

> "Q. Did Mr. William D. Guthrie of the city of New York have anything to do with that litigation then pending? A. Absolutely nothing.
>
> Q. Was he ever consulted, conferred with or even spoken to upon the subject, so far as you know? A. Not to my knowledge."

And in this testimony Mr. Meagher is fully corroborated by Mr. Knapp, president of the company (pp. 204–205), and by Mr. Billings, chairman of the board of directors (p. 226). It is, however, contended on behalf of the city of Chicago that because Mr. Guthrie, who was familiar with such questions and represented the largest stockholder of the company in a suit then pending in regard to the same matter, saw fit to argue the appeal of the company in this court, this fact tended to show collusion between Mr. Mills and the company in the bringing of this suit. Of course, if there had been any such collusion, Mr. Guthrie would never have been selected and put forward openly to argue on behalf of the company in this court.

In overruling this contention, the court below in its opinion well said (p. 386):

> "The fact that the same counsel was employed by the company in its suit, and by Mills in his, is not alone sufficient to show collusion. Mr. Guthrie was not of counsel for the company when the Mills suit was brought, and it may very well have transpired that the desire of the company to employ him in the argument before the Supreme Court arose after the

> Mills suit had been brought. Nor is it to be held that because two clients employ the same counsel respecting the same general end, they are in agreement or collusion as to the means of bringing about the end."

It is submitted that it was perfectly proper for Mr. Meagher as counsel for the People's Company to retain the counsel of the largest stockholder of the company to argue the appeal and perfectly proper for Mr. Guthrie to accept the retainer and endeavor to secure a favorable decision from this court in the interest of the company and all its stockholders.

When Mr. Guthrie accepted this retainer and entered his appearance in this court, the decree in the prior suit had not yet been amended *by consent between the People's Company and the city of Chicago.* It is true that Mr. Guthrie had expressed the opinion that this court might not on that appeal consider the merits but only the question of jurisdiction and that the question of power was not involved on the appeal (p. 255); but this expression of opinion, which subsequently turned out to have been well founded, differed from that of the company's counsel and in any event did not preclude Mr. Guthrie from arguing in this court in favor of a reversal or upon any other question involved, whether by asking leave to file a brief on behalf of his client Mr. Mills or by arguing directly on behalf of the company itself. If Mr. Guthrie had not been retained by the company, he would undoubtedly have asked leave to file a brief on behalf of Mr. Mills on the ground of the latter's large pecuniary interest in the result. Surely, the mere fact that Mr. Guthrie was of opin-

ion that the prior suit was insufficient—which view turned out to be correct—did not prevent him from striving to protect his client's large interests in the questions before this court. Indeed, had Mr. Guthrie declined to argue the case on behalf of the company when his client's large property interests demanded every effort on his part, he would have invited criticism. And yet because Mr. Guthrie did what any counsel under such circumstances ought to have done in the performance of his duty to protect his client and agreed to argue a case in which his client was vitally interested, it is now urged that his conduct was improper and establishes fraud and collusion in the writing of the letter of December 16, 1902, and in the institution of the present suit in June, 1903.

Upon this branch of the case, as upon others, the testimony is most unfairly distorted and misstated in appellant's brief. One example may suffice. The following is a sample of the method of argument and criticism in which counsel of the city of Chicago have indulged in the brief filed in this court (at p. 37):

> "Mr. Guthrie had already informed Mr. Meagher and his own client, Mr. Mills, according to the evidence of Mr. Meagher, that the People's Company could not possibly win the appeal of the company's case in this court. . . . Mr. Guthrie, with his high sense of professional honor, does not see any impropriety in accepting a retainer for the purpose of arguing a case that he thinks is unfounded."

As matter of fact, Mr. Guthrie's position was that this court might only consider the naked question of jurisdiction as the final decree stood before the amendment made on December 5, 1903, and that the question

of power was not involved (pp. 46, 255), and he never advised Mr. Mills or Mr. Meagher that the People's Company could not possibly win the appeal in this court, and there is no evidence in this case to warrant or excuse any such statement.

As the decree stood dismissing the bill for want of jurisdiction, Mr. Guthrie's opinion was correct as to the probability that this court would not consider the merits but would *reverse* on the question of jurisdiction (authorities cited *supra*, p. 49). There was no reason why he should not even then have urged the court to consider the merits. And after the decree was amended by consent on December 5, 1903, there was clearly no reason why Mr. Guthrie should not have argued in this court on behalf either of the company or of its stockholders, whose interests were the same, the question of contract right or the question of power of the city council. His so doing could not possibly tend to establish that the suit he was conducting for his client, Mr. Mills, involving the same questions, was collusive or unnecessarily instituted.

2.

As to the desire of the officers of the company in January, 1906, that complainant should succeed in this suit and thereby establish the invalidity of the ordinance of 1900.

Upon this point, the court below in its opinion used the following language (p. 386) :

> "The evidence that the company, its officers and stockholders now openly wish Mills to succeed is not alone sufficient. Since the Mills suit was brought, the company's suit had been heard and affirmed by

the Supreme Court of the United States. The company is without hope now of any relief through that suit. But that does not prove that at the time the Mills suit was brought, the company did not reasonably believe that the decree of the circuit court of the United States dismissing the bill would be reversed; and that the supplemental litigation demanded by Mills was unwise. The situation is changed; and with change of situation there naturally comes a change of views—a change that in no respect alters the fact of what the views were before the situation changed."

The testimony is as follows: Two of the directors of the defendant company, Mr. Billings and Mr. Brady, and its counsel, Mr. Meagher, frankly and candidly admitted that they then (*i. e.*, January, 1906) desired to see the complainant succeed in this suit (pp. 235, 248, 249, 264). Of course, if they had simulated the contrary, if they had pretended that they wanted the suit dismissed and the injunction vacated to the great injury of their company, the fact would have been urged as wholly discrediting their sincerity. After the situation had changed and this court had affirmed the adverse decree in the prior suit (194 U. S. 1) and the Supreme Court of Illinois had affirmed the decision in the *quo warranto* proceedings (*The People ex rel. Deneen* v. *The People's Gas Light & Coke Co.*, 205 Ill. 482, 492), every director and every officer of the company would naturally desire to see the complainant succeed in order that the ordinance, which had already been adjudged void in the pending suit (p. 49) and which threatened the destruction of the company's property (p. 224), might be again and finally determined

to have been passed without any legal authority whatever and to be an unauthorized exercise of power. There was no inconsistency in the fact that the directors refused to sue in January, 1903, and that, after the situation had wholly changed, they then desired to see the complainant prevail in January, 1906. Surely, it became then their duty either to institute a new suit or to help maintain the pending case which was of vital interest to the company and all its stockholders. Indeed, the city seems to contend that if the corporation had brought a new suit after the affirmance by this court "no one could argue that the corporation had been derelict in any of the duties that it owed to its stockholders" (p. 65). The fact is that the company never brought any such suit, but its failure to do so cannot operate to impute fraud or collusion to Mr. Mills.

In *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 113, where a stockholder filed a bill similar to the bill in the case at bar, it was contended in this court that the fact that the directors obviously desired the complainant to succeed and thus defeat the void statute was *evidence* of collusion, and emphasis was also laid upon the absence of any pleading on behalf of the company. The counsel who argued that case on behalf of the stockholder Cotting conceded in this court that the directors, of course, concurred with the complainant as to the unconstitutionality of the statute then in question, and desired his success and said that any pretense to the contrary would be transparently untrue. Speaking to this point, Mr. Justice Brewer said:

"There is no force in the suggestion that the offi-

> cers of the corporation agreed with the stockholders as to the unconstitutionality of the statute, and that therefore the suit is a collusive one. That was the condition in *Dodge* v. *Woolsey*, *supra*, and it only emphasizes the fact that the officers were refusing to protect the interests of the stockholders, not wantonly, it is true, but from prudential reasons."

It was likewise the condition in *The Delaware Railroad Tax Case*, 18 Wall. 206, 210.

So, also, in *Simpson* v. *Union Stock Yards Co.*, *supra* (110 Fed. Rep. 799, 801), the court said :

> " It was to the interest of the company to have the statute held invalid by the courts. No doubt every stockholder desired that result. No doubt that every stockholder hoped that able counsel would be employed to defeat the statute. But the board of directors could thus desire, and still refuse to incur the penalties."

See on the same question *Bowdoin College* v. *Merritt*, 63 Fed. Rep. 213, 215.

The mere fact that the People's Company in its answer prayed that the complainant's bill be dismissed is, of course, immaterial. As the testimony of Mr. Meagher shows, he evidently thought that the company's pleading should contain such a prayer, and followed the established form for the conclusion of answers in equity (p. 265). The amended answer, filed after the whole situation had changed, prayed that the complainant might be granted the relief prayed for (p. 384).

The fact that the counsel of the People's Company saw fit to delay filing any pleading, or subsequently filed an answer praying for a dismissal, which was by consent amended so as to pray that the complainant

be granted the relief prayed for, cannot prove collusion *at the time the suit was originally brought.* There was every sanction for the practice followed by counsel for the defendant company. In *Dodge* v. *Woolsey*, 18 How. 331, the company omitted to file any pleading, as also did the company in the *Cotting* case, 183 U. S. 79, and in the case of *Smyth* v. *Ames*, 169 U. S. 466. It is enough in all these cases that there is someone before the court, as here the defendant city, adequately litigating and contesting the complainant's right to relief. The attitude or procedure of the company after the suit had been instituted cannot affect the right of the complainant to maintain it or affect his good faith. The company having wrongfully refused to sue, and jurisdiction having attached on that basis, nothing that it might thereafter do or omit to do and no change of mind on its part could affect the progress of the suit, if otherwise the complainant were entitled to equitable relief on the merits at the time the bill was filed.

The authority relied on by the city in this phase, namely, *Corbus* v. *Gold Mining Co.*, 187 U. S. 455, is not at all in point, as will be seen by the following extract from the opinion of Mr. Justice Brewer, speaking for the court (p. 465) :

> "The rule requires that the plaintiff must set forth with particularity the efforts made by him to secure action by the directors. It does not appear that he made any effort to secure such action, but he relies simply on the distance of the directors from the place where he resides and in which the court is held as an excuse for not applying to them. We are of opinion that the excuse is not sufficient. He should at least

have shown some effort. If he had made an effort and obtained no satisfactory result either by reason of the distance of the directors or by their dilatoriness or unwillingness to act, a different case would have been presented, but to do nothing is not sufficient."

And no one appeared on behalf of the only defendant before the court, the United States intervening on its own account. In the case at bar, every effort was made to secure action both by the directors and by the stockholders and throughout the litigation the merits have been fiercely litigated on the part of the city defendant.

3.

As to Mr. Brady's contribution to the expenses of this suit.

The evidence showed that on May 14th, 1903, Anthony N. Brady, a large stockholder as well as a director and vice-president of the People's Company, sent the complainant Mills a check for $5,000 as a contribution towards the expenses of the litigation, and it is contended on the part of the city of Chicago that this payment tends to prove the existence of collusion between Mr. Mills and the People's Company.

Mr. Brady had been a holder of securities of the People's Company for at least fifteen years (p. 238), and at the time of the payment to Mr. Mills he owned more than 16,000 shares of its stock representing a par value of over $1,600,000 (p. 239). He was in fact the second largest stockholder (p. 240), Mr. Mills, with $2,205,500 par value, being the largest stockholder (p. 158). The uncontradicted evidence showed that on May 13th or 14th, 1903, *four months after the company had declined to sue,*

Mr. Mills met Mr. Brady and suggested to Mr. Brady that as he, Mr. Mills, was "bringing the suit at his own expense," Mr. Brady, as a large stockholder in the company, ought either to "contribute or get a contribution to help pay the expenses of the suit . . . from other large stockholders of record" (pp. 239, 242), and that Mr. Brady thereupon agreed that Mr. Mills ought not to be expected to pay the whole amount, and that he would send a contribution. Mr. Brady testified that he understood from Mr. Mills that $5,000 would be satisfactory (p. 240), that he appreciated that if Mr. Mills was successful in his suit it would be to the benefit of the stockholders of the company (p. 249), and that he sent Mr. Mills a check for $5,000 entirely as a personal contribution (p. 240). It was also shown by uncontradicted testimony that the company had had nothing to do directly or indirectly with this contribution, that it was not consulted about it, that the check was drawn on Mr. Brady's personal individual account, that the company had never reimbursed him, that the company had not contributed to the expenses of the suit, and that the fact of the payment was not known to the other officers of the company or to its counsel or indeed to Mr. Mills' own counsel (pp. 188, 210, 222, 240, 249, 261, 268).

The suit was on behalf and for the benefit of all the stockholders of the company (p. 2) to protect their interests as such. There was every reason why other stockholders ought to have shared in the expenses of the litigation and not have left the burden and liability to be borne wholly by Mr. Mills. It was, therefore, natural and proper for Mr. Mills to apply to Mr. Brady as the

second largest stockholder for a contribution, and likewise quite natural and proper for Mr. Brady, who was individually interested to the enormous amount of $1,600,000, to be willing to contribute. As Mr. Mills testified (p. 182):

> "I naturally would talk with him, because he was a stockholder almost equal to my own interest, and I considered that his interest—individual interest, was perhaps equal to mine. He was perfectly entitled to contribute—I would consider that he was perfectly entitled to contribute to the expenses of the case."

It is, however, urged as extremely suspicious that Mr. Brady's contribution was the exact amount, namely, $5,000, which Mr. Mills had already paid his counsel (p. 180), but this coincidence was explained by Mr. Brady who testified that he got the impression from Mr. Mills that $5,000 would be satisfactory (pp. 242–243). As the proposed suit was to be conducted at Mr. Mills' expense and would undoubtedly involve much expense in addition to the retainer already paid to Mr. Guthrie, there would have been nothing improper in Mr. Mills stating to Mr. Brady what he had already paid to his counsel, and suggesting that the other stockholders ought to reimburse him at least that amount. Mr. Mills testified on this point (pp. 163–164):

> "Q. Mr. Mills, at whose expense is this suit being conducted? A. At mine.
>
> Q. Have you any agreement—have you ever had any agreement with the company in regard to the institution of this suit, or in regard to the expense that you may incur in prosecuting this suit? A. No, sir.
>
> Q. Was this suit brought at the request of the

People's Gas Light and Coke Company? A. No, sir.

Q. Have you any agreement of any kind directly or indirectly with the People's Gas Light and Coke Company, or anyone, to indemnify you personally against the expenses and costs of this suit? A. No, sir."

The fullest opportunity was open to the defendant city of Chicago to have shown, if such had been the fact, that Mr. Brady's payment of $5,000 was really made by the company, as now seems to be suggested (appellant's brief, p. 43). Mr. Brady was cross-examined at length, and the city called for and introduced in evidence Mr. Brady's personal check drawn on his individual account. The city's counsel thereupon proceeded as follows (p. 242):

"[By city's counsel] Who first said anything about contributions here? Was it Mr. Mills or yourself? A. Mr. Mills.

Q. Now, what did he say? A. Well, he said the cost would probably be expensive, and that while he was a large stockholder, he ought not to be allowed to pay all the expense, that other large stockholders ought to contribute.

Q. What did you say? A. I agreed with him.

Q. Then what did he say? A. Oh, I don't remember what he said especially. I simply agreed that I would send him a contribution, and I did.

Q. Was anything said as to the amount? A. Well, I got an impression from what he said that $5,000 would be satisfactory, and I sent him that amount.

Q. Why did he say $5,000 would be satisfactory? A. I don't know that he said that. I got that impression from what he did say.

Q. Anyway, your recollection is that the $5,000

was fixed by him? A. I got the impression from what he said that if I sent $5,000 that would be satisfactory, and I sent him $5,000."

Mr. Brady further testified that the People's Company had nothing to do, directly or indirectly, with the contribution and that it was entirely a personal contribution. Thus after referring to the conversation with Mr. Mills, he testified (p. 240):

"Q. And what did you then do? A. I sent it to him.

"Q. A personal contribution? A. Entirely so.

"Q. Had the company anything to do, directly or indirectly, with that contribution? A. Not at all. They were never consulted about it.

"Q. Did you ever advise any of the officers of the company that you had made this personal contribution toward the expenses of this suit? A. I don't think so. If I did it was without any suggestion of their returning it. I don't think I did."

Mr. Brady further testified that he had never been reimbursed for the contribution (p. 249).

The propriety of Mr. Brady, as the second largest stockholder, thus contributing to the expenses of a suit in which he was vitally interested, ought to be clear and indisputable. Certainly it does not constitute evidence of collusion. *New Albany Waterworks Co.* v. *Louisville Banking Co.*, 122 Fed. Rep. 776, 778; *Consumers' Gas Trust Co.* v. *Quinby*, 137 Fed. Rep. 882, 883. That it constituted evidence of collusion would hardly have been seriously suggested had it not been for the fact that Mr. Brady was also vice-president of the company and as a director had proposed the resolution of January 29, 1903, in which the board had

declined to institute a new suit in the name of the company. This resolution was adopted upon the advice and responsibility of the counsel of the People's Company (pp. 204-205, 228-229, 256-257, 278-279). There is, however, no necessary inconsistency in a director voting to decline to authorize a suit in behalf of the company on the advice of the company's counsel and yet at the same time personally favoring any suit by a stockholder which might protect the stockholders' interests if the advice to the board and its action thereon should turn out to be mistaken or erroneous.

It is, of course, elementary that an officer acting personally and unofficially for the supposed protection of his individual personal interests would not bind or prejudice the company. Mr. Brady's voluntary contribution in his individual capacity made in May, 1903, furnishes no legal or moral evidence that he did not act in good faith in following the advice of the company's counsel at the board meeting of January 29, 1903, and his action as a director was not impugned by his subsequent payment to Mr. Mills. Indeed, even if his contribution in May, 1903, was inconsistent with his action as a director in January, no legitimate inference was to be drawn therefrom that *he and the whole board of directors* were acting on January 29th in pursuance of a fraudulent and collusive agreement with Mr. Mills, and that the advice of the company's counsel then given was not in good faith, but a mere pretense and subterfuge, nor could it tend to establish that the company had previously entered into a collusive agreement with Mr. Mills.

Yet this court is now asked to hold that Mr. Brady's

contribution in May, 1903, warrants the inference that all the directors and the counsel of the People's Company were acting in collusion with Mr. Mills when the board declined in January to institute a new suit. It is submitted that no such inference would be fair or just or legitimate. Such a ruling would have to disregard the uncontradicted and unimpeached testimony of Mr. Mills, of the officers of the company and of the company's counsel, Mr. Meagher, who fully explained the reasons why he and his associates, Judge Moran and Judge Sears, advised the board not to comply with Mr. Mills' request (pp. 255-258), and the court would have to infer collusion, which "implies the existence of fraud of some kind" (*Dickerman* v. *Northern Trust Company*, 176 U. S. 181, 190), from acts otherwise innocent and legal and which are clearly consistent with honesty of purpose and freedom from collusion. Moreover, if Mr. Mills had been a party to a secret collusive agreement with the directors to the effect that the company should fraudulently decline to sue in order that he might impose upon the circuit court of the United States a cause not properly within its jurisdiction, is it conceivable that he would have openly applied to the vice-president for a contribution a few days before the bill was actually filed? And if Mr. Brady and Mr. Mills had been parties to any such fraudulent scheme, is it conceivable that Mr. Brady would have sent his personal check to Mr. Mills and thus made a record of the fact of the payment which is now claimed to establish collusion? On the contrary, the very fact that Mr. Mills went to Mr. Brady as the

second largest stockholder and that Mr. Brady agreed to contribute to the expenses of the suit tends to show that so far as they were concerned they were not conscious of any secret collusive agreement to be concealed and that no such agreement in fact existed.

4.

As to Mr. Mills' testimony.

The testimony of the complainant, Mr. Mills, was characterized by evident truth and candor, although his memory was indistinct and confused as to several matters of dates and details. When we recall that he was over eighty years of age at the time the testimony was taken (p. 157), it is but just to make due allowance for infirmities of memory and some confusion as to dates and misunderstanding of questions and to accept his statement on cross-examination, in excuse for his failure to remember distinctly, viz. (p. 165) :

> "And I would like to remark here that my memory is not as sharp as it used to be about dates and conversations, and so forth, so that if I appear not to know it is a defect of the memory."

Mr. Brady also testified in regard to Mr. Mills' memory as follows (p. 240) :

> "He was not sure about anything, appeared to have lost all recollection of the conversations and everything else connected with it, excepting the fact that I had contributed."

There are, it is true, a few discrepancies in dates in Mr. Mills' testimony, and failure to remember conversations, but they are immaterial except when distorted and separated from the context or the accompanying expla-

nation. In Starkie on Evidence (10th ed.), pp. 830–831, the author well says:

> "Partial variances in the testimony of different witnesses on minute and collateral points, although they frequently afford the adverse advocate a topic for copious observation, are of little importance, unless they be of too prominent and striking a nature to be ascribed to mere inadvertence, inattention or defect of memory."

Thus, Mr. Mills stated on cross-examination that he had an impression that when he originally consulted Mr. Guthrie in 1902, the latter was then representing the company (p. 166). That this was an error was conclusively shown by the testimony of Mr. Knapp, Mr. Billings and Mr. Meagher to the effect that Mr. Guthrie did not represent the company in any way until July, 1903 (pp. 204, 205, 206, 221, 226, 258), and was then employed only for the purpose of arguing the pending appeal in the Supreme Court (pp. 226, 258). It is quite evident that the witness was confusing the years, and that as matter of fact Mr. Guthrie did not in any way represent the company until July, 1903. Indeed, Mr. Mills testified that his recollection was refreshed by a letter dated July 24, 1903 (p. 194), which, when read, will show that the information was undoubtedly communicated to him on that date.

Mr. Mills' memory was also indistinct in regard to the contribution of $5,000 made by Mr. Brady individually to the expenses of the suit. Mr. Mills could not recall any particular conversation with Mr. Brady on the subject and could only state his impression that Mr. Brady, as a large stockholder, had contributed to

the expenses of the suit and that "in some way I understood it was a contribution on account of the expenses of the suit" (p. 181).

Counsel for the city of Chicago, realizing the ease with which an old gentleman could be confused as to dates and time and the relation of different acts to each other as to time, made the most of this advantage, and endeavored to make it appear that Mr. Mills had no real knowledge of the steps that were being taken, and that his connection with the suit was a mere formality. We submit that this is not a fair inference from Mr. Mills' testimony. His letter to Mr. Guthrie, dated July 23, 1903 (p. 192), where he says that "I take it that the company is not anxious for an early time, but for my own satisfaction I should be pleased to know the probable date," clearly shows that at that time he was more active and had the matter better in mind than at the time of the trial, nearly three years afterwards. The lapse of time and the obvious infirmities due to his advanced age are a sufficient explanation of all minor inaccuracies in his testimony. He testified that he left the management of the suit entirely in his counsel's hands (pp. 169, 170, 197), which was a natural and proper thing to do, and he could not be expected to bear the details in mind several years afterwards.

It likewise appeared that Mr. Mills had misunderstood counsel and testified that the suit had been brought to confer jurisdiction on a court of the United States of a case which it would not otherwise have cognizance of. In regard to this point, the court below said (p. 386):

"The testimony relating to Mills' admissions is in-

conclusive. It impresses one upon reading it, rather as a misunderstanding of the question put, than as an admission of any agreement between Mills and the company; or any motive on his part, other than the lawful motive of bringing his suit in the court in which, under the constitution and laws of the United States, he is entitled to have it determined."

What actually occurred was as follows (p. 164):

"Q. Was the suit brought to confer on the court of the United States jurisdiction of a case which it would not otherwise have cognizance of?

Mr. Tone.—That is objected to as calling for a conclusion and incompetent.

The Examiner.—Note the objection.

A. I so understood it.

Q. Did you hear the question, Mr. Mills? A. I so understood it, yes, sir.

Q. You understood what? A. The question as put, if you will read it.

(Question read.)

Mr. Tone.—Same objection as before noted.

A. Yes, sir."

This was explained at p. 195 as follows:

"Q. At page 52 of the transcript you were asked the question as follows: 'Was the suit brought to confer on the court of the United States jurisdiction of a case which it would not otherwise have cognizance of?' And you answered: 'I so understood it.' Do you desire to make any correction or explanation of that answer?

Mr. Tone.—That is objected to on the ground that the question is itself incompetent, calling for a conclusion of law and of fact, and that witness' judgment and conclusion would not be competent evidence, and that it is not a subject-matter of expert testimony.

The Examiner.—The objection will be noted.

A. I don't think I properly understood the question.

Q. Had you any personal knowledge at that time of the legal questions involved as to jurisdiction of the state or federal courts?

Mr. Tone.—That is objected to as immaterial, what the complainant knew or did not know. His mental operations at that time not being a proper subject-matter of evidence.

The Examiner.—The objection will be noted.

The Witness.—What would be the question now?

(Question read.)

Mr. Tone.—Same objection as above noted.

A. I had no knowledge of the law on the question. I knew that Mr. Guthrie was to bring the suit in the United States Courts. The question of law in reference to the business I had no knowledge of.

Q. You knew that, did you not, from what Mr. Guthrie advised you?

Mr. Tone.—That is objected to also as suggestive and as calling for a conclusion rather than a fact and as incompetent because it is a communication between an attorney and his client, being alleged self-serving declarations in their own favor that are inadmissible in law.

The Examiner.—The objection will be noted.

A. Yes, sir."

Upon this testimony hangs the whole claim that Mr. Mills had himself confessed that the suit was *collusive*. It is, of course, obvious that Mr. Mills misunderstood the somewhat inartificial question of his counsel, and in this he was justified. The question was a formal one, founded upon the language of the ninety-fourth rule. What the witness undoubtedly understood was that, if he sued, the suit was to be brought in the federal court, and that the company's suit had been dis-

missed for want of jurisdiction. It is clear that the question did not call upon the witness to characterize as collusive the present suit or as false the sworn statement of his bill, twice verified under oath by himself, or to contradict his own testimony, and equally certain that the witness did not answer that he understood the suit was a collusive one or that it was brought under any agreement or understanding with the company in regard thereto. He had previously testified that he had had no agreement whatever with the company in regard to the institution of this suit, that he had consulted counsel on his own account, and that the suit had not been brought at the request of the company (pp. 163–165). His inadvertent and unintentional statement of a pure conclusion could not overthrow the clear proofs that the suit was brought without any agreement or understanding whatever with the company, in antagonism to the policy then being pursued by its legal advisers, without any agreement with it, and solely and honestly to protect the enormous property interests, then over $2,200,000, which he had in the People's Company.

The fact that Mr. Mills and his counsel expected, if suit were brought, to resort to a federal court for the protection of his large property rights in a case eminently calculated to excite interested local prejudice, furnishes no legitimate ground for criticism or suspicion. Nor is it extraordinary or suggestive of collusion that Mr. Mills understood that he could sue in a United States court if the company refused to sue. Such was the law. As a non-resident of Chicago, he naturally preferred the national tribunals. Would not any res-

ident of Chicago suing in New York in such a case prefer and seek a federal court? It would, indeed, be extraordinary if the federal courts should question the propriety in any case of a non-resident citizen desiring to seek the protection of a court of the United States, when one of the fundamental objects and "blessings" in the minds of the framers of the Constitution was to guarantee to every citizen non-resident of a state the constitutional right to appeal for justice and protection to national tribunals. As Mr. Justice Swayne said in *Davis* v. *Gray*, 16 Wall. 203, 221 :

> "The wise policy of the Constitution gives him a choice of tribunals. In the former [*i. e.*, a national court] he may hope to escape the local influences which sometimes disturb the even flow of justice."

See also *Smyth* v. *Ames*, 169 U. S. 466, at p. 517.

If, therefore, Mr. Mills desired to sue in order to have the questions decided in a court of the United States rather than in a state court, it would establish nothing tending to prove the existence of a *collusive agreement* on his part with the company to fraudulently impose upon the court by a sham demand and sham refusal to sue on the part of the directors and stockholders of the People's Company.

To repeat, the witness certainly did not state that he understood the suit was *collusively* brought or that there existed any agreement between himself and the company. Any such inference would be in conflict with all the facts proved as to what had taken place. Such a statement on his part as is quoted above, subsequently corrected, was at most a mere conclusion ; the city's

counsel at the time so insisted (p. 164), and the court would still have to draw its own inferences from the facts in evidence. And it is submitted that the facts in evidence do not warrant the inference that there existed an agreement or understanding between Mr. Mills and the People's Company to enable him to bring a collusive suit, but that on the contrary the evidence distinctly shows that the suit was brought in good faith without any agreement whatever and for the purpose of protecting the complainant's interests as a stockholder.

Moreover, the question as to whether or not the suit was collusively brought for the purpose of conferring jurisdiction upon the federal court could not be determined by the statement of the witness that he understood the purpose of the suit was to confer jurisdiction on the federal court. He might have such a purpose without the slightest collusion with the company. If there existed at the time a *bona fide* difference between the corporation and the stockholder, between his counsel and the company's counsel, and the corporation refused to comply with the demand which the stockholder as such had the right to make, and such refusal to take action was made without any agreement with him, then as a matter of law the suit would not be collusively brought for the purpose of conferring jurisdiction upon a federal court. Mr. Mills misconceived the question put to him by his counsel, and his subsequent explanation clearly showed that what he understood was that the suit was to be brought in the federal court and that this was the basis of his answer to the question referred to and the extent to which his testimony should

be taken. Particularly would he so understand in view of the fact that the company's suit had been dismissed by the federal court for want of jurisdiction. Very few, if any, laymen would be able to apprehend the purport of the question as put to Mr. Mills and answer it in the sense that a lawyer would. It would be a most natural understanding of such a question that his suit was to be brought in the federal court if the company refused to sue and that all steps to protect his interests would be in the federal court.

We most earnestly submit that a question of this importance, involving a charge of fraud and imposition on the court, ought not to be disposed of upon the mere misapprehension of a layman, whose faculties were affected by age, in regard to a question involving legal terms and at most a conclusion in conflict with the most positive testimony to the contrary not only of himself but of four other witnesses who were uncontradicted and unimpeached.

CONCLUSION.

It is, therefore, submitted, if the court shall hold that any definite question of jurisdiction was duly certified, that the findings of the court below should be affirmed.

Washington, December 10, 1906.

WILLIAM D. GUTHRIE,
JOHN J. HERRICK,
I. K. BOYESEN,
of counsel for appellee.

Appendix.

Act of May 18, 1905.

AN ACT to confer upon the city of Chicago the power and authority to sell surplus electricity and to fix the rates and charges for the supply of gas and electricity, for power, heating and lighting furnished by any individual, company or corporation to said city of Chicago, and the inhabitants thereof. Approved May 18, 1905. In force July 1, 1905 (Laws 1905, p. 111).

§1. *Be it enacted by the People of the State of Illinois represented in the General Assembly:* That upon the adoption of this act in the manner hereinafter provided, the city of Chicago shall have the power and authority to sell surplus electricity for heat, light and power within the corporate limits of said city, and is hereby empowered to prescribe by ordinance maximum rates and charges for the supply of gas and electricity for power, heating and lighting furnished by any individual, company or corporation to such city and the inhabitants thereof. Such rates and charges to be just and reasonable and may be fixed for a period not exceeding five years and in case the corporate authorities of any such city shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the circuit court of the county in which said city is situated. *Provided*, that nothing in this act contained shall be construed as enlarging the powers now conferred by law upon said city to own, construct or acquire electric lighting plants, or as permitting said city to sell electricity so long as the same is needed for light, heat and power for municipal purposes.

§2. This act shall not be in force until the question of its adoption shall first have been submitted to the electors of such city and approved by a majority of those voting thereon. The city council of the city of Chicago may direct by ordinance that the question of the adoption of this act by the city of Chicago, be submitted to popular vote at any general, city or special election in and for the entire city coming not sooner than thirty (30) days from and after the passage of such ordinance. The city clerk of said city shall certify the passage of such ordinance to the

proper election officials and it shall thereupon be the duty of such election officials to submit the question of the adoption of this act by the city of Chicago to popular vote. The city clerk of the city of Chicago shall also give at least thirty (30) days' notice of such election by publishing a notice thereof in one or more newspapers of general circulation within such city.

§3. The ballots to be used at such election shall be in the following form:

"For the adoption of an act entitled 'An Act to confer upon the city of Chicago, power and authority to sell surplus electricity, and to fix the rates and charges for the supply of gas or electricity, and to fix the rates and charges for the supply of gas or electricity for power, heating and lighting furnished by any individual, company or corporation to said city of Chicago and the inhabitants thereof.'"	Yes	
	No	

If a majority of the votes cast upon said proposition at said election shall be voted for the adoption of this act it shall thereby and thereupon be adopted by and be in force in the city of Chicago.

Ordinance of February 8, 1906.

Be it Ordained by the City Council of the City of Chicago:

SECTION 1. That no corporation, company or companies, firm or person, manufacturing, selling, supplying or distributing gas in the City of Chicago for illuminating or for fuel purposes, shall charge, exact, demand or collect from any consumer thereof, for the next five years from and after the taking effect of this ordinance, more than the sum of eighty-five cents for one thousand cubic feet of gas consumed or used. Said sum of eighty-five cents per one thousand cubic feet of gas shall be the net price charged, exacted, demanded or collected from each consumer; provided, however, that any corporation, company or companies, firm or person, distributing or selling gas in the

City of Chicago, may charge ninety-five cents per one thousand cubic feet of gas furnished to such consumer in all cases where payment at the rate of eighty-five cents per one thousand cubic feet is not made to said corporation, company or companies, firm or person, within ten days from the date of bill for same. The illuminating gas so furnished shall afford a light of not less than twenty-two candle power, to be measured and ascertained at the places of consumption in said city by the most modern appliances known to science for measuring the candle power of illuminating gas.

Provided, however, that for gas consumed by the City of Chicago the price charged per one thousand cubic feet shall not exceed eighty-five cents regardless of date of payment for same.

SEC. 2. That any company, corporation, person or persons, who shall, during the five year period above mentioned, remove any meter or meters from the house, store, factory or premises of any consumer of gas in the City of Chicago, against the will and consent of any such consumer of gas who is willing to pay for gas furnished him, it or them by such company, corporation, person or persons, and tenders the amount due at the price established and fixed in Section 1 of this ordinance, shall be subject to a penalty of not less than twenty-five dollars nor more than two hundred dollars for each and every offense; provided, however, that any company, corporation, person or persons furnishing gas to consumers in the City of Chicago shall have the right to remove any meter or meters for the purpose of repairing the same, on condition that such meter or meters so removed shall be replaced, or a new one substituted in its place, within twenty-four hours of the time of the removal of any such meter or meters.

SEC. 3. That any company, corporation, person or persons who shall, in violation of the provisions of the preceding sections, charge or require the City of Chicago, or any citizen thereof, or any consumer of gas therein, to pay for gas furnished to it or them, or either of them, during the five year period mentioned in Section 1, a sum in excess of the rates specified in said Section 1, or who shall, during said period, furnish to the said City of Chicago, or any citizen thereof, manufactured gas of less than twenty-two candle power, shall be subject to a penalty of not less than twenty-five dollars, nor more than two hundred dollars, for each and every offense.

SEC. 4. That the ordinance passed by the City Council of the City of Chicago on October 15, 1900, regulating the maximum prices of gas to be charged to consumers and to the City of Chicago by persons, firms or corporations manufacturing, selling, or distributing gas within the City of Chicago be and the same is hereby repealed, except as hereinafter provided.

SEC. 5. That the repeal of the ordinance mentioned in the preceding section shall not affect suits pending or rights existing at the time this ordinance takes effect or penalties then incurred, but the City of Chicago and all persons, firms, companies or corporations who were consumers of gas within the City of Chicago during any portion of the time said ordinance was in effect, shall hereafter have the right, severally and respectively, to bring and maintain such suit or suits in any court or courts of competent jurisdiction for the purpose of recovering any and all penalties, demands, overcharges or claims based on or growing out of the rights conferred by said ordinance of October 15, 1900, in the same manner and to the same extent as if said ordinance had not been repealed; and the said ordinance of October 15, 1900, shall continue in full force and effect for all the purposes aforesaid.

SEC. 6. That any company or companies manufacturing or distributing gas may purchase or sell gas to or from any other company or companies manufacturing or distributing gas in the City of Chicago; and any such company or companies may lease and demise to any other company or companies, mains, pipes, meters, works, plant and appliances, or any part thereof, of such company or companies, on such terms as said companies may agree upon, and such other company or companies may take and acquire the mains, pipes, meters, works, plant and appliance, or any part thereof, so leased and demised, and thereafter operate the same and manufacture and distribute gas by means thereof; and such purchase and sale of gas, or such lease and demise of pipes, mains, meters, works, plant and appliances, or any part thereof, shall never be held or construed to be an abandonment or waiver of any ordinance rights of the company or companies so selling gas or leasing and demising its mains, pipes, meters, works, plant and appliances, or any part thereof, nor as authorizing the assignment of any ordinance vested in the company so selling gas, or leasing and demising its mains, pipes, meters, works, plant and appliances, or any part thereof, nor as

authorizing a lease and demise of franchise rights not authorized by the laws of the State of Illinois.

Provided, however, that if the State of Illinois, or the City of Chicago, or any other governmental authority or agency shall hereafter at any time after said period of five years regulate, or seek to regulate the price or quality of gas furnished or sold or to be furnished or sold in the City of Chicago by any of the said companies, the said companies and each of them expressly agree that no purchase or sale, contract, agreement, lease or demise authorized by this section, or by this ordinance shall operate to deprive or shall be held or considered as depriving or having deprived said State, City, or other governmental authority or agency of the right or any right to make such regulation after said period of five years or as lessening in any way such right of regulation ; and the said companies and each of them agree that neither they nor any of them will or can set up or urge any of the provisions of this ordinance or any purchase, sale, contract, agreement, lease or demise authorized herein or hereby for the purpose or with the effect of obtaining or fixing any higher price or lower quality for gas sold or furnished in said City of Chicago than the price or quality which may at any time after said period of five years be fixed or established by said State, or City, or any other governmental authority or agency.

It is expressly understood and agreed, however, that none of said companies by accepting this ordinance, or by reason of any of the provisions thereof, concedes that the City of Chicago has now or may hereafter have any power or authority to regulate the price or quality of gas furnished or used in said City, but said companies and each of them expressly agree to comply with the terms and provisions of section 1 of this ordinance as to the price and quality of gas furnished by said companies or any of them during the said period of five years fixed therein.

Sec. 7. Section 13 of the ordinance passed February 25, 1895, and accepted March 4, 1895, granting the right to the Ogden Gas Company to construct, maintain and operate gas works in the City of Chicago and Section 12 of the ordinance passed July 23, 1894, accepted August 22, 1894, granting the right to the Universal Gas Company to construct, maintain and operate gas works within the City of Chicago, and each of said sections shall be and they are hereby repealed; provided, however, that nothing herein contained shall ever be held or construed as in any manner

prejudicing or affecting the right of the City of Chicago to purchase the entire plant of said Ogden Gas Company and all its property and effects of every kind and description within the City of Chicago, at the appraised value thereof, at the time and in the manner and subject to the terms and conditions expressed in Section 14 of said ordinance granting to the Ogden Gas Company the right to construct, maintain and operate gas works in the City of Chicago, nor as in any manner prejudicing or affecting the right of the City of Chicago to purchase the entire plant of said Universal Gas Company and all its property and effects of every kind and description within the City of Chicago, at the appraised value thereof at the time and in the manner and subject to the terms and conditions expressed in Section 13 of the said ordinance granting the right to the Universal Gas Company to construct, maintain and operate gas works within the City of Chicago.

SEC. 8. The Ogden Gas Company and any company or companies manufacturing or distributing gas, to whom it may sell gas or to whom it may lease and demise its mains, pipes, meters, works, plant and appliances, or any part thereof, as hereinbefore authorized, are hereby released and absolved from the payment, from and after the taking effect of this ordinance, of the compensation provided to be paid to the City of Chicago in and by Section 9 of said ordinance passed February 25, 1895, granting to said Ogden Gas Company the right to construct, maintain and operate gas works in the City of Chicago, which said Section 9 of said ordinance be and it is hereby repealed; and the Universal Gas Company and any company or companies manufacturing or distributing gas, to whom it may sell gas or to whom it may lease and demise its mains, pipes, meters, works, plant and appliances, or any part thereof, as hereinbefore authorized, are hereby released and absolved from the payment, from and after the taking effect of this ordinance, of the compensation provided to be paid to the City of Chicago in and by Section 8 of said ordinance passed July 23, 1894, granting to said Universal Gas Company the right to construct, maintain and operate gas works in the City of Chicago, which said Section 8 of said ordinance be and it is hereby repealed. And the People's Gas Light and Coke Company, the Ogden Gas Company and the Universal Gas Company are hereby severally released and discharged from all obligations to make payment of any compensation to the City of Chicago under said ordinances

or otherwise; provided, however, nothing herein contained shall ever be construed as releasing or waiving the existing obligation to pay, from and after the passage and taking effect of this ordinance, five per cent. of the gross receipts from the sale of natural gas, as hereinafter mentioned.

SEC. 9. The amount due from the People's Gas Light and Coke Company to the City of Chicago up to the time of taking effect of this ordinance, being five per cent. of the gross revenue derived from the sales of natural gas, shall be paid to the City of Chicago by crediting said amount upon the sum of upwards of $1,300,000 due from the City of Chicago to the People's Gas Light and Coke Company for gas furnished for lighting the streets of the City of Chicago by said the People's Gas Light and Coke Company. The People's Gas Light and Coke Company shall release and discharge the City of Chicago from the payment of the net amount due from the City of Chicago for gas supplied by said the People's Gas Light and Coke Company for lighting the streets of the City of Chicago. The Ogden Gas Company shall pay in cash to the City of Chicago the amount due up to the time of taking effect of this ordinance, being upwards of $117,000, on account of the compensation provided to be paid in and by section 9 of said ordinance passed February 25, 1895. The City of Chicago shall release all claims it has against the Universal Gas Company on account of claims for unpaid compensation under said ordinance passed July 23, 1894.

The Universal Gas Company shall release and discharge the City of Chicago from all claims it has against said City of Chicago for a refund of moneys heretofore deposited with the City of Chicago by the said Universal Gas Company.

The People's Gas Light and Coke Company shall pay the five per cent. on the gross revenue derived from the sales of natural gas in the City of Chicago from and after the taking effect of this ordinance.

The bill filed by the City of Chicago against the Ogden Gas Company, the People's Gas Light and Coke Company, and the Farmers' Loan and Trust Company, pending in the Circuit Court of the United States for the Northern District of Illinois, and being general number 25879 of said court, shall be forthwith dismissed by the City of Chicago without costs to either party.

SEC. 10. Nothing in this ordinance contained shall extend

or enlarge the period within which any of the companies mentioned herein or any grantee or lessee thereof is now, or may hereafter be authorized by ordinance, or otherwise, to manufacture, sell or supply gas in the said City of Chicago or to occupy or use any of the streets, alleys or public grounds in said city or any part thereof.

SEC. 11. This ordinance shall first be published in the manner provided by law, and ten days after such publication has been made this ordinance shall take effect, provided the People's Gas Light and Coke Company, the Ogden Gas Company and the Universal Gas Company shall severally accept the same in writing, and the Ogden Gas Company pay the amount in cash due the City of Chicago from said Ogden Gas Company, and the People's Gas Light and Coke Company acknowledge to the City of Chicago payment in full of all net sums due it from the City of Chicago on account of gas furnished for lighting the streets of the City of Chicago, and the Univeral Gas Company shall, in writing, release and discharge the City of Chicago of and from the payment of all sums due to said Universal Gas Company, on account of moneys heretofore deposited with the City of Chicago by said Universal Gas Company, all during said period of ten days; and upon the taking effect of this ordinance, this ordinance shall constitute a contract by and between the City of Chicago and said the People's Gas Light and Coke Company, and by and between the City of Chicago and said Ogden Gas Company, and by and between the City of Chicago and said Universal Gas Company.

STATE OF ILLINOIS, }
County of Cook, } ss.:

I, A. C. ANSON, City Clerk of the City of Chicago, do hereby certify that the above and foregoing is a true and correct copy of an ordinance concerning the price of gas in the City of Chicago, passed by the City Council of the City of Chicago on the 8th day of February, A. D. 1906, original of which ordinance is on file in this office and that I am the lawful custodian of the same.

Witness my hand the corporate seal of said City of Chicago this 9th day of February, A. D. 1906.

(sd.) A. C. ANSON,
City Clerk.

[SEAL.]